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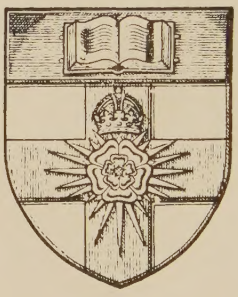

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THE

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English and Irish Appeal Cases

AND

Claims of Peerage

BEFORE

THE HOUSE OF LORDS.

REPORTED BY CHARLES CLARK, ONE OF HER MAJESTY'S COUNSEL,
BY APPOINTMENT OF THE HOUSE OF LORDS.

VOL. VI.

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A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

	PAGE
Allen *v.* The Bishop of Gloucester (*Church Building Act—Subscribers—Trustees*) . .	219
Attorney-General (The) *v.* Great Eastern Railway Co. (*Railway—Power to stop up a Street—Deposited Plans*) . . .	367
——— *v.* Mayor, &c., of Cambridge (*Market—"Enlarge"*)	303
——— *v.* Wax Chandlers' Company (*Will—Charity—Surplus—"Condition" Added Property—Back Rents*)	1
Beauchamp (Earl) *v.* Winn (*Franchise "Warren"—"Warren of Conies" — "Lodge thereupon built"*)	223
Betts, De Vitre and Others *v.* .	319
Browne *v.* McClintock (*Form of Order—Practice*) . . .	434
——— *v.* ——— (*Bill to set Purchase for Fraud—Form of Issue—New Trial—Delay* .	456
Bush, Murray and Others *v.* .	37
Cambridge (Mayor, &c., of), The Attorney-General *v.* . . .	303
Cellier and Another, Weguelin and Others *v.*	286
Citizens' Bank of Louisiana *v.* First National Bank of New Orleans (*Bank Bills—Representations — Appropriation of Funds*)	352
Coleman & Knight, Liquidators of the Imperial Mercantile Credit Association *v.* . .	189
Crook, Hill *v.*.	265
De Vitre and Others *v.* Betts (*Patent—Election of Remedy for Infringement—Costs*) . .	319
Dixon, Lamare *v.*	414
Dudman *v.* Vigar (*Tithes—"Tillage"*)	212
Eve, James *v.*	335
First National Bank of New Orleans, Citizens' Bank of Louisiana *v.*	352

PAGE

Giles *v.* Melsom (*Will—Same Manner — "So specifically devised*) 24
Gloucester (Bishop of) Allen *v.* 219
Great Eastern Railway Co., The Attorney-General *v.* . . 367
Gurney, Peek *v.* . . . 377

Hill *v.* Crook (*Will—Illegitimate Children*) 265

Imperial Mercantile Credit Association (Liquidators of the) *v.* Coleman & Knight (*Director—Fiduciary Character—Declaration of Interest—Partner*) . 189

James *v.* Eve (*Companies—Illegal Appointment of Directors—Commission*) 335
——— *v.* May (*Company—Nominal Shareholder—Trustee—Indemnity—Voluntary Winding-up*) . 328

Lamare *v.* Dixon (*Agreement—Specific Performance—Acquiescence—Form of Decree—Costs*) 414

McClintock, Browne *v.* . . 434
———, ——— *v.* . . 456
Macnabb, Directors of the Taff Vale Railway Co. *v.* . . 169

PAGE

May, James *v.* . . . 328
Melsom, Giles *v.* . . . 24
Murray and Others *v.* Bush (*Contributory — Directors—Transfer of Shares—Irregularity—7 & 8 Vict. c.* 110*—Costs*) . . 37

Peck *v.* Gurney (*Company—Prospectus—Allottee—Purchaser of Shares*) 377
Potter, Rankin *v.* . . . 83

Rankin *v.* Potter (*Insurance—Total Loss—Perils of the Sea—Other Causes—Abandonment—Notice*) 83

Taff Vale Railway Company (Directors of the) *v.* Macnabb (*Covenants in a Lease — Railway and Docks—Ultrà Vires—Costs*) 169

Vigar, Dudman *v.* . . . 212

Wax Chandlers' Company, The Attorney-General *v.* . . 1
Weguelin and Others *v.* Cellier and Another (*Consignees—Freight on Shipowner's own Goods—Set-off*) 286
Winn, Earl Beauchamp *v.* . 223

TABLE OF CASES CITED.

A.

		PAGE
Aberdeen Railway Company *v.* Blaikie	1 Macq. Sc. Ap. Cas. 461	193
Adams and Lamberts' Case	4 Co. Rep. 96, 114, 116, *et seq.*	5
Armstrong *v.* Armstrong	3 My. & K. 45	443
Atkin *v.* Delmege	12 Ir. Eq. Rep. 1	443
Attorney-General (The) *v.* Beverley (Mayor of)	15 Beav. 540; 6 De G. M. & G. 256; 6 H. L. C. 310	5
——— *v.* Brazenose College	2 Cl. & F. 295	5
——— *v.* Bristol (Mayor of)	2 Jac. & W. 291	5
——— *v.* Coopers' Company	3 Beav. 29	4
——— *v.* Cordwainers' Company	3 My. & K. 534	68
——— *v.* Coventry	2 Vern. 397; 2 Jac. & W. 369; 3 Madd. 353	4
——— *v.* Drapers' Company	2 Beav. 508	4
——— *v.* Drummond	1 D. & War. 353	275
——— *v.* Jesus College, Oxford	29 Beav. 163	4
——— *v.* Leeds Corporation	Law Rep. 5 Ch. Ap. 583	370
——— *v.* Merchant Taylors' Company	Law Rep. 11 Eq. 35; 6 Ch. Ap. 512	5
——— *v.* Tewkesbury and Malvern Railway Company	1 De G. J. & S. 423	370
——— *v.* Trinity College, Cambridge	24 Beav. 583	8
——— *v.* Winchelsea	3 Bro. C. C. 373, 379	4
——— *v.* The Dean and Canons of Windsor	8 H. L. C. 369	19

B.

Bagley *v.* Mollard	1 Russ. & My. 581	270
Barber *v.* Fleming	Law Rep. 5 Q. B. 59	114
Bargate *v.* Shortridge	5 H. L. C. 297	43
Barnett *v.* Tugwell	31 Beav. 232	272
Barry *v.* Croskey	2 J. & H. 1	381
Barwick *v.* English Joint Stock Bank	Law Rep. 2 Ex. 259	381
Bayley *v.* Snelham	1 S. & S. 78	270
Beachcroft *v.* Beachcroft	1 Madd. 430	274
Bedford *v.* Bagshaw	4 H. & N. 538; 29 L. J. (Ex.) 59	377

		PAGE
Bedingfield *v.* Feak	Cro. Eliz. 467	213
Benson *v.* Chapman	6 Man. & G. 792; 7 Scott, 625; 5 C. B. (Ex. Ch.) 530; 2 H. L. C. 696	90
——— *v.* Heathorn	1 Y. & C. Ch. 326	194
Betts *v.* Neilson	Law Rep. 3 Ch. Ap. 429	319
Bingham *v.* Bingham	1 Ves. Sen. 126	228
Birch *v.* Stephenson	3 Taunt. 469	213
Blades *v.* Higgs	11 H. L. C. 621	229
Blain *v.* Agar	1 Sim. 37; 2 Sim. 289	381
Boulstone *v.* Hardy	Cro. Eliz. 547	228
Broughton *v.* Hutt	3 De G. & J. 501	228
Brown, Ex parte	19 Beav. 97	42
Buccleuch (Duke of) *v.* Wakefield	Law Rep. 4 H. L. 377	229
Burnell *v.* Brown	1 Jac. & W. 168	419
Burnes *v.* Pennell	2 H. L. C. 497	43, 381
Burrowes *v.* Lock	10 Ves. 470	381
Butlin *v.* Masters	2 Phil. 290	457

C.

Callaghan *v.* Callaghan	8 Cl. & F. 374	418
Cambridge *v.* Anderton	2 B. & C. 691	89, 122
Campbell *v.* Ingelby	1 De G. & J. 393	229
Carrick *v.* Harrison	2 De G. & J. 208	356
Cartwright *v.* Vawdrey	5 Ves. 530	269
Champion *v.* Rigby	1 Russ. & My. 539	457
Chandelor *v.* Lopus	Cro. Jac. 4; 1 Sm. L. C. 140, n.	381
Chaplin *v.* Young	33 Beav. 414	195
Charter *v.* Trevelyan	4 L. J. (N.S.) Ch. 214; 11 Cl. & F. 714	459
Christy *v.* Row	1 Taunt. 300	292
Clanricarde (Marquis of) *v.* Henning	30 Beav. 175	458
Clarke *v.* Dickson	El. Bl. & El. 148, and 6 C. B. (N.S.) 453	381
Clifton *v.* Goodbun	Law Rep. 6 Eq. 278	272
Clough *v.* London and North Western Railway	Law Rep. 7 Ex. 34	119
Cochrane *v.* Willes	Law Rep. 1 Ch. Ap. 58	228
Cologan *v.* London Assurance Company	5 M. & S. 447	91
Colt *v.* Woolaston	2 P. Wms. 154	381
Cooper *v.* Phibbs	Law Rep. 2 H. L. 149	228
Cope *v.* Doherty	2 De G. & J. 614	370
Cullen *v.* Thomson	4 Macq. Sc. Ap. 424	383
Curwen *v.* Salkeld	3 East, 538	308

D.

Dalby *v.* India and London Life Assurance Company	15 C. B. 365; 2 L. J. (C.P.) 2	119
Davenports' Trusts, *In re*	1 Sm. & Giff. 126	271
Davidson *v.* Tulloch	3 Macq. Sc. Ap. 783	383
Davies's Case	3 Mod. 246	229
Dawson *v.* Thomson	3 Macq. Sc. Ap. 783	381
Day *v.* Newman	2 Cox, 77	418

		PAGE
Dean *v.* Hornby	3 El. & Bl. 180	127
De Rutzen *v.* Lloyd	5 Ad. & El. 456	308
De Winton *v.* The Mayor of Brecon	26 Beav. 533	370
Dixon *v.* Graham	5 Dow. 266	469
Doe *d.* Woodall *v.* Woodall	3 C. B. 349	27
Dornett *v.* Beckford	2 B. & Ad. 521	291
Dover *v.* Alexander	2 Hare, 275	271
Duranty's Case	26 Beav. 268	381
Durrant *v.* Friend	5 De G. & Sm. 343	271

E.

Ernest *v.* Nicholls	6 H. L. C. 401	195
Evans *v.* Bicknell	6 Ves. 174	381
—— *v.* Davies	7 Hare, 498; 18 L. J. (Ch.) 180	275
—— *v.* Llewelly	2 Bro. C. C. 150	229
—— *v.* Prothero	1 De G. M. & G. 572	446
—— *v.* Smallcombe	Law Rep. 3 H. L. 249	41
Ex parte Brown	19 Beav. 97	42
—— Imbert	1 De G. & J. 152	356
—— James	8 Ves. 337	194
—— Spackman	1 M. & G. 170; 18 L. J. (Ch.) 261	78

F.

Farewell *v.* Coker	2 Mer. 353	228
Farnworth *v.* Hyde	18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207); on appeal, Law Rep. 2 C. P. 204	92
Fawcett *v.* Whitehouse	1 Russ. & My. 132	194
Feise *v.* Wray	3 East, 93	293
Feoffees of Heriot's Hospital *v.* Gibson	2 Dow. 301	368
Fernie *v.* Young	Law Rep. 1 H. L. 63	445
Fleming *v.* Smith	1 H. L. C. 513	88
Foley *v.* United Fire and Marine Insurance Company	Law Rep. 5 C. P. 155	96
Forbes *v.* Aspinall	13 East, 325	143
Forests, The Case of the	12 Co. Rep. 22	228
Foster *v.* Charles	6 Bing. 396; 7 Bing. 105	381
—— *v.* Oxford and Worcester Railway Company	13 C. B. 200; 22 L. J. (C.P.) 99	193
Fraser *v.* Pigott	1 You. 354	270
Freeman *v.* Cooke	2 Ex. 654	360

G.

Galloway *v.* Mayor, &c. of London	Law Rep. 1 H. L. 34	308
Galvanized Iron Company *v.* Westoby	8 Ex. 17	42
Gerhard *v.* Bates	2 El. & Bl. 476	377
Gernon *v.* Royal Exchange Assurance Company	6 Taunt. 383	138
Gill *v.* Shelley	2 Russ. & My. 336	270
Godfrey *v.* Davis	6 Ves. 43	269
Godsall *v.* Boldero	9 East, 72	118

		PAGE
Gordon *v.* Gordon	1 Mer. 141	274
——— *v.* Majoribanks	6 Dow. 87	368
Grant *v.* Grant	Law Rep. 5 C. P. 380	275
Great Luxembourg Railway Company *v.* Magnay	25 Beav. 586	195
Green *v.* Royal Exchange Assurance Company	6 Taunt. 68	91
Gregory *v.* Gregory	Coop. Ch. Cas. 201; Jac. 631	457
Grey *v.* Pearson	6 H. L. C. 61	269
Gumm *v.* Tyrie	4 B. & S. 680; affirmed 6 B. & S. 298	292

H.

Haille *v.* Smith	1 B. & P. 563	293
Hambly *v.* Trott	Cowp. 371	383
Hamilton *v.* Mendez	2 Burr. 1198; 1 Sir W. B. 276	91
Hammersley *v.* De Biel	12 Cl. & F. 45	356
Harris *v.* Lloyd	T. & R. 310	270
——— *v.* Pepperill	Law Rep. 5 Eq. 1	228
Hart *v.* Durand	3 Anst. 684	274
Hawkins *v.* Gathercole	6 De G. M. & G. 1	370
Hay *v.* Willoughby	10 Hare, 242; 22 L. J. (Ch.) 249	42
Haywood *v.* Cope	25 Beav. 140	419
Henderson *v.* Lacon	Law Rep. 5 Eq. 249–262	381
Heriot's Hospital (Feoffees of) *v.* Gibson	2 Dow. 301	368
Hichens *v.* Congreve	1 Russ. & My. 150, n.	194
Hill *v.* Gray	1 Stark. 484	390
Hills *v.* Evans	8 Jur. (N.S.) 525–531; 31 L. J. (Ch.) 457–466; 4 De G. F. & J. 288	320
Holford *v.* Bailey	8 Q. B. 1000	229
Holt *v.* Sindrey	Law Rep. 7 Eq. 170	272
Houldsworth *v.* Evans	Law Rep. 3 H. L. 263	41
Houlton's Case	1 Mer. 616	383
Howard *v.* Wheatley	3 De G. M. & G. 628	43
Howarth *v.* Mills	Law Rep. 2 Eq. 389	272
Hughes *v.* Chester and Holyhead Railway Company	3 De G. F. & J. 352	370
Hurst *v.* Usborne	18 C. B. 144; 25 L. J. (C. P.) 209	117

I.

Idle *v.* Royal Exchange Assurance Company	8 Taunt. 755	91
Imbert, Ex parte	1 De G. & J. 152	356
Imperial Mercantile Credit Association *v.* Coleman & Knight	Law Rep. 6 H. L. 189	394
In re Ingle's Trusts	Law Rep. 11 Eq. 578	275
Ingram *v.* Thorp	7 Hare, 67	381
Ingle's Trusts, In re	Law Rep. 11 Eq. 578	275
—— National Financial Company	Law Rep. 3 Ch. Ap. 791	332
—— Palmer	3 H. & N. 26	27
—— Well's Estate	Law Rep. 6 Eq. 599	272
Irving *v.* Manning	1 H. L. C. 287	144

J.

		PAGE
James, Ex parte	8 Ves. 337	194
Jenkins *v.* Hughes	8 H. L. C. 571	269
Jessop's Case	2 De G. & J. 638	43
Joint Stock Discount Company *v.* Brown	Law Rep. 8 Eq. 381	383
Jorden *v.* Money	5 H. L. C. 185	353

K.

Keates *v.* Earl Cadogan	10 C. B. 591; 20 L. J. (C. P.) 76	383
Kelly *v.* Solari	9 M. & W. 54	95
Kemp *v.* Halliday	6 B. & S. 763	118
Knight *v.* Faith	15 Q. B. 649	90

L.

Lancashire and Yorkshire Railway Company *v.* East Lancashire Railway Company	5 H. L. C. 792	174
Land Credit Company of Ireland *v.* Lord Fermoy	Law Rep. 5 Ch. Ap. 763	383
Lansdowne *v.* Lansdowne	1 Madd. 116	383
Le Neve *v.* Mile End Old Town	8 El. & Bl. 1054	306
Lepine *v.* Bean	Law Rep. 10 Eq. 160	273
Levy *v.* Langridge	4 M. & W. 337	381
Lewis *v.* M'Kee	Law Rep. 2 Ex. 37	294
London and Northern Insurance Corporation (Stace and Worth's Case)	Law Rep. 4 Ch. Ap. 682	340

M.

M'Carthy *v.* Abel	5 East, 388	145
——— *v.* Decaix	2 Russ. & My. 614–621	228
M'Gregor *v.* Topham	3 H. L. C. 132	446, n.
Maitland's Case	Law Rep. 3 Ch. Ap. 791	332
Malcomson *v.* O'Dea	10 H. L. Cas. 603	236
Mallan *v.* May	11 M. & W. 653	174
Marshall *v.* Collett	1 Y. & C. Ex. 232	229
——— *v.* Ullswater	3 B. & S. 732	227
Martin *v.* Crokatt	14 East, 465	89
Mason *v.* Bateson	26 Beav. 404	271
——— *v.* Sainsbury	3 Doug. Ed. by Rose (8vo.) 61	118
Maunsell *v.* White	4 H. L. Cas. 1039	357
Merchant Taylors' Company *v.* The Attorney-General	Law Rep. 11 Eq. 35; 6 Ch. Ap. 512	6
Meredith *v.* Farr	2 Y & C. Ch. 525	270
Midland Great Western Railway of Ireland *v.* Johnson	6 H. L. C. 798	229
Mitchell *v.* Edie	1 T. R. 608	120
Moore *v.* Burke	4 F. & F. 259	383
Morgan *v.* Griffith	Law Rep. 6 Ex. 70	357
Morris *v.* Cannon	2 De G. & J. 638; 27 L. J. (Ch.) 757	43
——— *v.* Dimes	3 Nev. & M. 674	256

		PAGE
Morrison *v.* Barrow	1 De G. F. & J. 633	443
Mortimer *v.* West	3 Russ. 370	270
Moss *v.* Smith	9 C. B. 94; 19 L. J. (C.P.) 225	88
—— *v.* Steam Gondola Company	18 C. B. 180	51
Mount *v.* Harrison	4 Bing. 388	91
——— *v.* Larkins	8 Bing. 108–122	148
Myers *v.* Watson	1 Sim. (N.S.) 528; see Sug. V. & P., 13th Ed. p. 20; see also pp. 131, 231	418

N.

National Insurance Company, In re	Law Rep. 3 Ch. Ap. 791	332
Neilson *v.* Betts	Law Rep. 5 H. L. 1	319
New Brunswick & Canada Railway Company *v.* Muggeridge	1 Dr. & Sm. 363–381	380
Nicol *v.* Vaughan	1 Bli. (N.S.) 505; 2 Dow. & Cl. 420; 1 Cl. & F. 495	457
North British Railway Company *v.* Todd	12 Cl. & F. 722	368

O.

Oakes *v.* Turquand	Law Rep. 2 H. L. 325	381
O'Connor *v.* Malone	6 Cl. & F. 572	446
Ogilvie *v.* Currie	37 L. J. (Ch.) 541	381
Ord *v.* Ord	Law Rep. 2 Eq. 393	27
Overhill's Trusts	1 Sm. & Giff. 362	271
Owen *v.* Bryant	2 De G. M. & G. 697	275

P.

Palmer, In re	3 H. & N. 26	27
Parker *v.* Great Western Railway Company	7 Scott, N. R. 835; 13 L. J. (C.P.) 105	369
——— *v.* Tootal	11 H. L. C. 143	270
Pasley *v.* Freeman	3 T. R. 51	381
Penn *v.* Bibby	Law Rep. 2 Ch. Ap. 127	447
Pickard *v.* Sears	6 Ad. & E. 469	360
Pickering's Case	Law Rep. 6 Ch. Ap. 525	194
Pincomb *v.* Thomas	Cro. Jac. 524	228
Popham *v.* Exham	10 Ir. Ch. Rep. (N.S.) 440	458
Potter *v.* Campbell	16 W. R. 399; Printed Papers in the case, 165	94
Powell *v.* Aiken	4 K. & J. 347, 352	383
Pratt *v.* Mathew	22 Beav. 328	271
Pretty *v.* Solly	26 Beav. 606	370
Prince's Case, The	8 Co. Rep. 1	228

R.

Ramsden *v.* Hylton	2 Ves. Sen. 304	228
Ramshire *v.* Bolton	Law Rep. 8 Eq. 294	381
Randal *v.* Cockran	1 Ves. 98	118

		PAGE
Randall *v.* Errington	10 Ves. 423	459
Rashdall *v.* Ford	Law Rep. 2 Eq. 750	229
Rawlings *v.* Wickham	3 De G. & J. 304	381
Read *v.* Bonham	3 B. & B. 147	89
Rex *v.* Cotterell	1 B. & Ald. 67	308
—— *v.* Inhabitants of Piddletrenthide	3 T. R. 772	229
Rice *v.* Wiseman	3 Bulst. 82; 1 Roll. 259	228
Rigge *v.* The Earl of Lonsdale	11 Ex. 654; 1 H. & N. 923	229
Roberts *v.* Tunstall	4 Hare, 257	457
Roddy *v.* Fitzgerald	6 H. L. C. 876	269
Rolfe *v.* Gregory	13 W. R. 355; 4 De G. J. & S. 576	459
Ronayne's Case	13 Ir. Ch. Rep. (N.S.) 444	458
Rosetto *v.* Gurney	11 C. B. 176; 20 L. J. (C.P.) 257	88
Ross *v.* Ross	2 Coll. C. C. 259	27
Roux *v.* Salvador	3 Bing. N. C. 266	89

S.

Savage *v.* Robertson	Law Rep. 7 Eq. 176	274
Savery *v.* King	5 H. L. C. 627	459
Scales *v.* Pickering	4 Bing. 448	370
Scott *v.* Dixon	29 L. J. (Ex.) 62, n.	377
Scottish Marine Insurance Company *v.* Turner	1 Mac. Sc. Ap. 328, 334	90
Seymour *v.* Bagshaw	18 C. B. 983; 29 L. J. (Ex.) 62, n.	377
Shepard *v.* De Bernales	13 East, 565	291
Sherratt *v.* Mountford	Law Rep. 15 Eq. 305	275
Ship *v.* Croskill	Law Rep. 10 Eq. 73	383
Sibbering *v.* Earl of Balcarras	3 De G. & Sm. 735	457
Simpson *v.* Holliday	Law Rep. 1 H. L. 315	446
Slim *v.* Croucher	1 De G. F. & J. 518	381
Smith *v.* Bell	10 M. & W. 378	370
—— *v.* Clay	3 Bro. C. C. 640, n.	229
Smurthwaite *v.* Wilkins	11 C. B. (N.S.) 842; 3 L. J. (C.P.) 214	294
Southmolton (Mayor of) *v.* The Attorney-General	5 H. L. C. 1, 31	4
Spackman *v.* Evans	Law Rep. 3 H. L. 171	41
——, Ex parte	1 M. & G. 170; 18 L. J. (Ch.) 261	78
Stace and Worth's Case	Law Rep. 4 Ch. Ap. 682	340
Standley's Estate	Law Rep. 5 Eq. 303, 310	272
Stewart *v.* Greenock Marine Insurance Company	2 H. L. C. 159	90
Stourbridge Canal Company *v.* Wheeley	2 B. & Ad. 792	370
Straffon's Executor's Case	1 De G. M. & G. 576	43
Stringer *v.* English and Scottish Marine Insurance Company	Law Rep. 4 Q. B. 676	96
Suydam *v.* Marine Insurance Company	1 Johns. (N.Y.) 181, 2nd Ed. 138	87
Swaine *v.* Kennerley	1 V. & B. 469	269
Swinfin *v.* Swinfin	27 Beav. 148	446

T.

Tapp *v.* Lee	3 Bos. & Pul. 367	381
Thetford School Case	8 Co. Rep. 130	4
Thomson *v.* Simpson	Law Rep. 5 Ch. Ap. 659	356

		PAGE
Townly *v.* Gibson	2 T. R. 701	228
Townsend *v.* Crowdy	8 C. B. (N.S.) 477; 29 L. J. (C. P.) 300	95
——— *v.* Standgroom	6 Ves. 323	418
Turquand *v.* Marshall	Law Rep. 4 Ch. Ap. 376	43
Tyrrell *v.* The Bank of London	10 H. L. C. 26	197

U.

Underwood *v.* Courtown	2 Sch. & Lef. 41	229

V.

Venezuela Company *v.* Kisch	Law Rep. 2 H. L. 99–113	381
Vyvyan *v.* Vyvyan	30 Beav. 65; affirmed, 4 De G. F. & J. 183	457

W.

Wall *v.* Cockerell	10 H. L. C. 229	458
Walsham *v.* Stainton	1 D. J. & S. 678	381
Warner *v.* Warner	20 L. J. (Ch.) 273	276
Wason *v.* Wareing	15 Beav. 151	228
Watson *v.* The Mid-Wales Railway Company	Law Rep. 2 C. P. 593	294
Wells Estate, In re	Law Rep. 6 Eq. 599	272
Western Bank of Scotland *v.* Addie	Law Rep. 1 H. L., Sc. 145	381
Whilster *v.* Paslow	Cro. Jac. 487	228
Wilkinson *v.* Adam	1 V. & B. 422	269
——— *v.* The Anglo-Californian Gold Mining Company	18 Q. B. 728	42
Winchester (Bishop of) *v.* Knight	1 P. Wms. 406	383
Windsor, Case of the Dean and Canons of	8 H. L. C. 369	19
Woodhouselee (Lord) *v.* Dalrymple	2 Mer. 419	270
Worts *v.* Cubitt	19 Beav. 421	271
Wright *v.* Wilkin	2 Best & S. 232	6

Appeal Cases

BEFORE

THE HOUSE OF LORDS.

ENGLISH AND IRISH APPEALS.

THE ATTORNEY-GENERAL . . . . . APPELLANT;

AND

THE MASTER, WARDENS, &c., OF THE WAX CHANDLERS' CO. . . . . } RESPONDENTS.

1873
Feb. 10, 11, 17.

2 App Cas 221. 4 App Cas 54

Will—Charity—Surplus—"Condition"—Added Property—Back Rents.

Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more.

In 1558 a testator gave certain houses in *Old Change* to his son and the son's heirs, but, if the son died without issue, to the *Wax Chandlers* of the City of *London*, "for this intent and purpose and upon this condition," that they should distribute annually £8 in the manner therein described, viz., £3 18*s.* to the poor of *St. Mary Magdalen*, and 2*s.* to the churchwardens for their painstaking; 38*s.* to the poor of the parish of *Bexley* in *Kent*, and 2*s.* to the churchwardens of that parish for their pains; 35*s.* to the poorest men and women of the *Company of Wax Chandlers*, and the other 5*s.* to the Master and Wardens of the Company, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparation of the said houses and tenements." If the Master and Wardens should leave any of these things undone, the property was to go over to the testator's next of kin, "upon condition that they should do all these things." The son died unmarried, and the *Wax Chandlers* entered into possession, kept the premises in repair, and, after the great Fire of *London*, rebuilt them. The rents had largely increased:—

Held, that the will created a trust; that all the income was exhausted by the appropriations of it directed by the will, and that consequently the whole was properly applicable to purposes of charity.

The *Wax Chandlers* had in 1790 purchased a small piece of property

1873

ATTORNEY-GENERAL *v.* MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

adjoining the devised land, and had built upon it, so that the original and the purchased property were now conjoined and formed one whole. There was no distinct proof as to the funds out of which this added property had been purchased. In the absence of such proof, it was *held*, that the added property must be treated as belonging to the *Wax Chandlers*; and it was declared that it did belong to them, and an order was made for an inquiry to distinguish the two properties, and for the application of the rents and profits thereof.

To declare under such circumstances as existed here that this added property was to be applied to the purposes of the charity would be like following and taking possession of the back rents *bonâ fide* received by the company: a course which the practice of the Court did not sanction.

"Reparation" of premises, used in a gift of those premises to a charity, must be held to comprehend their restoration in the event of any catastrophe befalling them.

THIS was an appeal against a decree of Lord Chancellor *Hatherley* (1), which had affirmed a previous decision of the Master of the Rolls (2).

William Kendall, a Liveryman of the *Wax Chandlers' Company*, by his will, dated the 31st of January, 1558, after several other bequests and legacies, made the following devise:—"I give unto *William Kendall* my son all my houses and tenements in the *Old Change*, in the parish of *Mary Magdalen*, in *London*, at *Old Fish Street End*, to have and to hold unto the said *William*, and to the heirs of his body lawfully begotten, and for default of such issue I will that the Master, Wardens, and Commonaltie of the *Mystery of Wax Chandlers* of the City of *London*, and their successors, shall have the said housings and tenements, for this intent and purpose and upon this condition, that they shall yearly distribute eight pounds of lawful money of *England* after this manner, that is to say, to the poor inhabitants of the parish of *Mary Magdalen* aforesaid, at *Old Fish Street End*, four pounds lacking two shillings, in gowns for men and women, and coals, at the discretion of the churchwardens of the said parish, to be given and delivered unto the said poore inhabitants, in the month of December yearly, and the said two shillings to the churchwardens of the said parish for their painstaking; and to distribute yearly to the poor inhabitants of the parish of *Bexley*, in the county of *Kent*, thirty-eight shillings of good and lawful money of *England*, to be given and delivered yearly, about the third and fourth days of November

(1) Law Rep. 5 Ch. Ap. 503. (2) Law Rep. 8 Eq. 452.

yearly, by the discretion of the churchwardens and chief inhabitants of the said parish of *Bexley* then being, and two shillings to the churchwardens of the said parish of *Bexley*, for their great pains; and thirty-five shillings to be distributed unto the poorest men and women of the *Company of Wax Chandlers* of *London*, and the other five shillings to be distributed to the Master and Wardens of the *Wax Chandlers* for the time being equally; and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparation of the said houses and tenements. And if the Master, Wardens, and Commonalty of the *Mystery of Wax Chandlers of London*, and their successors, shall leave any of these things undone, above rehearsed, then I will that the next of kindred unto me the said *William* shall enter into the said tenements, and them have and hold unto him and his heirs for ever, upon condition that he and they and every of them do all these things above rehearsed, in all points as it is above rehearsed by me."

The testator died on the 21st of February, 1558, and his son died, unmarried, in November, 1563. The *Wax Chandlers' Company* then entered into possession of the devised premises, and distributed the moneys as directed in the will. At the time of the testator's death the annual income from the premises appeared to be about £9 4*s*., which, after paying the £8 specifically devised, and deducting 16*s*. for quit rent, left 8*s*. for the company to satisfy repairs. At the time when the company took possession that value had increased to £16. In the great Fire of *London* the premises were destroyed, and were rebuilt at the expense of the *Wax Chandlers' Company*. In the year 1790 the company bought from one *Deborah King*, for a sum of £350, a small piece of land, which had never belonged to the testator, but immediately adjoined and surrounded the land devised; and the two properties were thrown together and built upon, and now formed one set of premises. The present annual value of the whole was £330, and the *Wax Chandlers*, after paying the sums mentioned in the will, appropriated the increase for their own benefit.

In 1867 the Attorney-General, at the instance of the Charity Commissioners, filed an information against the Master and Wardens of the *Wax Chandlers' Company*, setting forth the will, and

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

praying that it might be declared that the Defendants were not entitled for their own benefit to the whole income of the property devised by the will, subject to the annual charges therein stated, which amounted (exclusive of the 5*s.* thereby authorized to be reserved by and for themselves) to the sum of £7 15*s.*, but that they were trustees for the property and the whole income thereof, for charitable purposes; and that the piece of land purchased in 1790 was subject to the same trusts, and formed part of the charity property. The information contained the usual prayer for relief on the footing of these declarations.

The case was heard before the Master of the Rolls in August, 1869, when the information was ordered to be dismissed; and on appeal to the Lord Chancellor that order was affirmed. This appeal was then brought.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Vaughan Hawkins*, for the Appellant:—

The whole of the devised property was devoted to the purposes of charity. The rule in such a matter first declared in the *Thetford School Case* (1), has been followed ever since: *The Attorney-General* v. *Winchelsea* (2); *The Attorney-General* v. *Coventry* (3); and is fully stated and explained by Lord *St. Leonards* in *The Mayor of Southmolton* v. *The Attorney-General* (4), and the cases of *The Attorney-General* v. *The Drapers' Company* (5), *The Attorney-General* v. *The Coopers' Company* (6), and *The Attorney-General* v. *Jesus College, Oxford* (7), all proceed on the principle that "If all the rents of the estate are given they represent the estate." If they are so given in portions as to exhaust the whole, that is a gift of the whole estate, and any increase must go to the donees, according to the proportions settled by the gift. Here the whole was exhausted—first of all in specific gifts, and then the will went on, "the rest of the profits to be bestowed upon the reparation of the said houses and tenements." There was thus nothing else to be disposed of, and consequently any increase in the fund went

(1) 8 Co. Rep. 130.
(2) 3 Bro. C. C. 373, 379.
(3) 2 Vern. 397; 2 Jac. & W. 369; 3 Madd. 353.
(4) 5 H. L. C. 1, 31.
(5) 2 Beav. 508.
(6) 3 Beav. 29.
(7) 29 Beav. 163.

to the objects to which all the portions of the fund has thus been appropriated. *The Attorney-General* v. *Brazennose College* (1), and *The Attorney-General* v. *The Mayor of Beverley* (2), do not in the least degree impugn this contention. In the former, the money was given to be applied as the trustees should think fit, and the donor himself had acted as one of the first trustees, and had shewn what was his intention in his gift by the way in which he applied the fund; and in the latter there was an "overplus" expressly mentioned, and it was said that unless the donees, the Mayor and Aldermen of the Borough, "can spare anything out of the 50*s.* overplus," which clearly proved that the "overplus" was to belong to them, certain rates there mentioned were to be paid in another manner. These decisions therefore shewed that but for the special circumstances connected with the gifts, distinctly indicating what had been the intention of the testator, the whole fund would have gone to charity. There is no such indication of a special intention in the present case, and *The Attorney-General* v. *The Mayor of Bristol* (3), where the gifts did not exhaust the whole fund, is therefore inapplicable here. On the contrary, the whole purpose is charity, and where there is one great purpose indicated in such a will, all the smaller incidents which depend upon it must follow its course: *Adams and Lambert's Case,* and the cases there collected (4). There, gifts to superstitious uses, impressed others which were incidental to them, with the same character, and the whole went to the king. That is the case here; the repairs of the houses are necessarily incidental to the charitable gift, and may be considered as forming part of the purpose of the gift. The decision in the present case has in substance been overruled by the same Judges in a case which subsequently came before them: *The Attorney-General* v. *The Merchant Taylors' Company* (5).

The word "condition" in this will must not be construed as different from the words "intent and purpose." It is not doubted that these words refer to charity, but it is supposed that "condition" here implies a charge or liability which the Respondents are bound to undertake, even to their own loss, and that therefore

(1) 2 Cl. & F. 295.
(2) 15 Beav. 540; 6 De G. M. & G. 256; 6 H. L. C. 310.
(3) 2 Jac. & W. 291.
(4) 4 Co. Rep. 96, 114, 116, *et seq.*
(5) Law Rep. 11 Eq. 35; 6 Ch. Ap. 512.

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

they are entitled to the profit of the increased income. But the word "condition" does not impose such an obligation. In former times that word was constantly used as the ordinary style of speech in creating a trust: *Duke*, Charitable Uses (1); and very recently in *Wright* v. *Wilkin* (2), and it must here receive that construction.

As to the second point, the *Wax Chandlers* were in possession of the rents and profits of the property. After paying the specific sums in charity, they kept the residue in their own hands. They purchased property immediately adjoining the charity property, touching it and almost surrounded by it, and joined the two together. It must be assumed this was done with the charity funds, and the added property, like the rest, must be treated as the charity property.

Sir *R. Baggallay*, Q.C., and Mr. *Charles Browne*, for the Respondents:—

If the rule that the intention of the testator is to govern the construction of his will (and Lord *Eldon* in *The Attorney-General* v. *The Mayor of Bristol* (3), declared that to be the only proper rule), is applied to this case, the judgment of the Court below must be sustained. *Kendall* was a member of the *Wax Chandlers' Company*, trusted it, and had an affection for it, as is shewn by his gift to the poor members of the company. He intended to impose a trust upon it, but not a burden; he meant that the performance of the trust should be attended by compensation to those who performed it, and therefore gave to the master and wardens of the company, as he did to the churchwardens of the two parishes, a reward for their trouble. But he did not mean to cast on the *Wax Chandlers' Company* the burden of maintaining his houses in repair without furnishing some funds to meet those repairs. The property was to be subject to the charges imposed on it, which charges amounted altogether to £8 a year. At the time the will was made the houses produced £9 4*s.* a year; but an inquisition, *post mortem*, taken in June, 1567, expressly states that at that time these premises "were worth in all their revenues, beyond reprises, £16 a year." It is impossible to believe that the testator did not know

(1) By Bridgman, 123, 124, 137. (2) 2 Best & S. 232.
(3) 2 Jac. & W. 317.

that the premises were worth more than they actually produced to him, and that he did not intend to give all that surplus to the *Wax Chandlers*, whom he intrusted with the distribution of his charities, and whom he put under the "condition" of keeping his houses in repair. That he thought the houses worth more than they then produced, and that to lose them would be a real loss to their possessors, is shewn by the fact that he attached the penalty of forfeiture of the houses to the fault of a non-compliance with his will. This forfeiture of the property would have been no penalty but an advantage, if the burden of sustaining the houses was always to be greater than the surplus obtained from the rents, or even if the whole of that surplus, whatever it might become, was required to be applied to sustaining the houses. The cases relied on by the other side do not affect the present, for in them an intention to give the whole income to charity was plainly manifested, and being so, of course the increase of the income went to charity. It is not so here. It is admitted that in many cases the word "condition" may be treated as equivalent to trust; but it is not so here. The words here are more favourable to the *Wax Chandlers' Company* for the purpose of creating a gift of the surplus than they were in the case of *The Attorney-General* v. *The Corporation of Beverley* (1), or *The Attorney-General* v. *Brazennose College* (2), and yet in both those the intention of the testator, as manifested by the general terms of the will, was held to govern the application of the property. The general intention here was that of a gift to the company in the confidence that the trusts created by the testator would be discharged by the company, which is therefore entitled to the surplus after the performance of those trusts. The belief of the *Wax Chandlers* that they were the owners of the property, subject only to the trusts specifically imposed upon them, was shewn by the fact that when the great Fire of *London* happened, and these premises were burnt, the *Wax Chandlers*, out of their own funds, rebuilt them. There was, therefore, as in the case of *The Attorney-General* v. *Brazennose College* (2) conduct which ought to be taken into consideration in estimating what had always been deemed to be the intention of the testator.

(1) 6 H. L. C. 310. 3 Jur. N.S. 871 (2) 2 Cl. & F. 295.

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

The case of *The Merchant Taylors' Company* v. *The Attorney-General* (1) does not overrule the decision in the present case, for, as the argument on the part of the Attorney-General there shewed, that case and this are plainly distinguishable from each other. The form of the gift was different, and the liability of the company was different, and, as was remarked there, while the gift over, in case of default in performance of the trusts, was to persons who could not take beneficially, here it was to the next of kin, who must have taken beneficially. It is clear, therefore, that the testator intended that those who were to have the surplus were to take a benefit. There is here no indication that the testator intended the whole of the property to go to charity. On the contrary, he created a condition and imposed a duty, and gave the residue as the means of satisfying both: *The Attorney-General* v. *The Cordwainers' Company* (2). Upon this principle in *The Attorney-General* v. *Trinity College, Cambridge* (3), where there was no specific gift of the residue to the college, it was held entitled, after performing the charitable trusts, to keep the increased profits, and *The Attorney-General* v. *Jesus College, Oxford* (4) was decided the other way solely because it was clear from the words of the will that the whole fund had been exhausted in the different gifts to charity.

As to the second point, there is not the least evidence to shew that the additional property was purchased with income derived from the funds of the charity. On the contrary, there was a loan made to the company, and afterwards repaid by the company out of its general income. This additional property indisputably belongs to the Respondents.

Mr. *Vaughan Hawkins* replied.

LORD CHELMSFORD:—

My Lords, upon this appeal two questions have been raised; first, whether the Respondents, the Master and Wardens of the *Wax Chandlers' Company*, are beneficially entitled to the rents and

(1) Law Rep. 11 Eq. 35, 39; 6 Ch. Ap. 512.
(2) 3 My. & K. 534.
(3) 24 Beav. 383.
(4) 29 Beav. 163.

Jm W 572

profits of certain houses and tenements devised to them by the will of *William Kendall*, they paying and distributing certain sums to and amongst certain specified charitable and other objects, or whether they, the Defendants in the information, are trustees of the whole of the rents and profits of the houses merely for charitable purposes; and secondly, if it should be held that the Defendants are such trustees, whether a piece of land purchased by them and built upon so as to be intermingled with the charity property, is thereby made part of that property, or continues to belong to them.

There have been numerous decisions upon gifts to charities, some of which are not easily reconcileable with each other; a fact partly to be accounted for from each of them depending upon the construction of the particular instrument of gift, upon which different minds are likely to be struck in a different manner as to the *indicia* of intention in the donor. As the cases resolve themselves into mere questions of intention, not to be gathered from the use of particular expressions occurring here and there, but to be collected from the whole of the instrument, it would seem that little assistance could be obtained from other decisions. But certain general rules have been laid down (not improperly called in the argument canons of construction) which may be usefully applied to the determination of each particular case, although the proper construction of every instrument must be found within itself.

The rules to be collected from the cases are, as Lord Chancellor *Hatherley* truly stated, clearly and precisely laid down by Lord *St. Leonards* in the case of *The Mayor of Southmolton* v. *The Attorney-General* (1). The only cases which have any bearing upon the present are those where a testator, without expressing any general intention to devote his whole property to charity, has devised it, and required the devisee to give portions of it to certain charitable objects, not exhausting the whole estate, and has either left the residue or surplus undisposed of, or has appropriated it to an object which may or may not require the whole of it to be applied. In the former case of the undisposed of surplus or residue, the devisee, according to the case of *The Attorney-General* v. *The Mayor*

(1) 5 H. L. C. 1.

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

of Bristol (1), will take the whole of the property, subject only to the specific appropriation. In the latter case, where the surplus or residue is appropriated to an object which may or may not exhaust the whole of it, the question to whom it belongs is one which depends entirely upon the construction of the instrument of gift, and the discovery of the intention of the testator may occasionally be not unattended with difficulty.

William Kendall, by his will, made on the 31st of January, 1558, says:—[His Lordship here read the words of the will, see *ante*, p. 2].

These last are the important words of the will, and they are those on which we have now to put a construction.

Upon a consideration of the whole of that devise, does it appear to have been the intention of *William Kendall* to give his houses and tenements in the *Old Change* to the *Wax Chandlers* merely as trustees for the charitable and other objects mentioned in his will, or did he intend them to have the benefit of all the profits that should remain after applying what was necessary to satisfy these objects? Very little (if any) stress can properly be laid upon the words "intent and purpose" and "upon condition" in the will as proof of the testator's intention to create either a trust or a condition. Cases are to be found in which, in gifts of this sort, a condition has been held to be created by the word "intent," and it was not unusual formerly in charitable dispositions to impose trusts in the form of conditions. The Master of the Rolls in his judgment in this case suggested that the words "intent and purpose" and "upon condition" might be taken distributively; the former words imposing a trust upon the company to make the payments to the specified objects, and the latter creating a condition that they should keep the premises in repair. I am unable to distinguish the devises from each other in the manner proposed. The fund for the charitable purposes and for the repairs is the same, viz. the rents and profits of the houses; for when the testator says "the rest of the profits of the said houses I will shall be bestowed upon the reparations," he clearly shews his intention that the £8 given to the charitable and other objects are to be paid out of those rents and profits. If the payment of the £8 had been an absolute payment to be made by the company, then there would have been

(1) 2 Jac. & W. 291.

no doubt that the whole would have been condition and not trust, but as the £8 are to be paid out of the rents and profits, and the rest of the profits are to be bestowed upon the repairs, the two portions of the devise must almost necessarily be of the same character.

But it was argued that the clause as to bestowing the rest of the profits upon repairs must be understood with this qualification —so far as it is necessary for repairs to be done; for that it would be unreasonable and absurd to suppose that the whole of the remainder of the property, whatever its value, should be expended in repairs, whether they were wanted or not. Some time was occupied in shewing the value of the houses at the time of the will, and at subsequent periods, but arguments of intention drawn from considerations of the probable increase of value of the property are of little avail. A testator may fairly be presumed to look only to the condition of the property at the time when he is making his will, and as the yearly rental of the houses in question at that time appears to have been £9 4*s.*, subject to a quit rent of 16*s.*, making a net rental of £8 8*s.*—there is no ground for supposing that the testator, if he had carefully considered the question, would have thought that 8*s.* a year was an extravagant amount to set apart for repairs.

It is only upon these uncertain conjectures of probable intention that the Master of the Rolls and the Lord Chancellor have refused to give effect to the language of the testator according to its natural construction, which "by the rest of the profits" must mean the whole of the rest of the profits after the payment of the £8.

It was observed by the Master of the Rolls that the testator, being a member of the *Wax Chandlers' Company*, and having its members before his mind at the time of making his will, they take no benefit under it unless the surplus rents are given to them. But this is assuming, and for the purpose of construing the clause in this sense, that he did intend to give them a benefit. There is no reason why the testator should not have intended merely to shew his respect for them, by making them the administrators of his charitable dispositions, and by the annual payment which he directed to be made to the master and wardens of the company. The argument which pressed most strongly upon the Master of the Rolls

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

(as he said) was the gift over to the kindred upon the *Wax Chandlers' Company* leaving undone any of the things directed to be done by them. His Lordship says, "the kindred clearly took the property beneficially." But I may venture to ask, how is that so clear? One reason he assigns is "because it is expressly given to them, *on condition* that they do the things rehearsed in all points." But I am led to an opposite conclusion by those very words. The next of kin are to be substituted for the *Wax Chandlers* in the event of their failing to perform the things the performance of which is imposed upon them. We have seen that the words "on condition" may be expressive of a trust—and when the next of kin are to hold upon condition that they do all things above rehearsed in all points as above rehearsed, they come in the place of the Respondents, and are exactly on the same footing as the Respondents stood under the will, with precisely the same duties imposed upon them, and in the same character.

There can be no doubt that the testator's intention in requiring the profits, after payment of the £8, to be laid out in reparations was, that the houses should always be kept in a sufficient condition to realize the amount which was to be applicable to the charitable objects in his will. The clause providing for the repairs may, therefore, be regarded as accessory to the primary charitable dispositions, and of a similar character with them, whether trust or condition. This is like the cases cited in argument from *Coke's* Reports (1), wherein were devises of the issues and profits of houses or land part to be applied to superstitious uses, and the residue to the reparation of the subject of the uses, and it was held that the devise of the residue was dependent upon the uses and of the same character; the whole was, therefore, held to be superstitious, and the houses or land were forfeited to the King.

The cases mentioned by Sir *Richard Baggallay* in his argument of *The Attorney-General* v. *The Cordwainers' Company* (2), and *The Attorney-General* v. *The Coopers' Company* (3), are both of them distinguishable from the present case. In the case of *The Cordwainers' Company* the Master of the Rolls held, that the estate devised to the corporation was given absolutely, and was rather a

(1) 4 Co. Rep. 96–114. (2) 3 My. & K. 554.
(3) 3 Beav. 29.

gift upon condition than a gift upon trust. And in the case of *The Coopers' Company* (which appears to have been somewhat doubted), the sum of £3 given for the repairs of the houses devised to the company was represented to be an amount remaining after gifts of different sums to different objects, and was to be put into the common box of the company towards the reparations of the houses when need should be, importing that it should go into the funds of the company, and be mixed up with and become part of them.

It seems to me very difficult to distinguish this case from the case of *The Merchant Taylors' Company* v. *The Attorney-General* (1), mentioned in the argument, in which there were unanimous judgments of the Master of the Rolls, the Lord Chancellor, and the two Lords Justices. The devises in both cases are in nearly similar terms, "to the intent and upon condition." The payments to the charitable objects are in both to be made out of the rents and profits, for there is no substantial difference between an express direction to this effect in *The Merchant Taylors' Case* and a necessary implication from the words "rest of the profits" in the present case. And the appropriations of the rents and profits to the repairs of the houses are in both cases undistinguishable in terms; the words "the whole residue of the rents and profits" in the one case being identical with the words "the rest of the profits" in the other. And the direction to the *Merchant Taylors' Company* to gather yearly into a whole stock the residue of the rents and profits, and therewith to do and keep the reparations of the tenements devised to them, is exactly equivalent to the expression of the will of the testator in the present case, that the rest of the profits (that is, of course, the yearly profits) shall be bestowed upon the reparations of the houses and tenements.

I have come to the conclusion that the Lord Chancellor's decree cannot be supported; and I entertain this opinion with the more confidence, as he does not appear to have been strongly impressed with the propriety of the decision of the Master of the Rolls, all that he could bring himself to say on dismissing the appeal being, "On the whole, I cannot come to the conclusion that the Master of the Rolls' decision is wrong."

(1) Law Rep. 6 Ch. Ap. 512.

1873

ATTORNEY-GENERAL *v.* MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

Upon the minor question in the case, as to the right of the Respondents to the piece of land purchased by them in 1790, and since built upon, the buildings erected being partly on the piece of land, and partly on the charity land, I am of opinion that the Respondents are entitled to it as their own property. An attempt was made to shew that the purchase by the Respondents was made out of the rents and profits of the houses devised to them upon the charitable trusts; but this does not appear to me to have been proved. The Defendants have, for many years, been treating these rents and profits as their own property, *bonâ fide* believing them to be so. If it could have been proved that any part of the original rents and profits had been expressly applied to the purchase of the land in question, to take it from them now would be virtually to make them account for rents and profits prior to the filing of the information—a mode of dealing with charitable trustees who have acted fairly and honestly, though mistakenly, as to the charity funds not adopted by the Court of Chancery.

I would advise your Lordships that the decree of the Lord Chancellor should be reversed, and that the following declaration should be made by your Lordships. I wish to call the particular attention of Counsel to this declaration, because it is proposed that it should be handed to them in order that they may suggest any alterations which they think would be necessary in its form.

"Declare that the Respondents are trustees of the houses and tenements in the *Old Change*, in the parish of *Mary Magdalene*, devised by the will of *William Kendall* in the information mentioned; and that the whole rents and income of the said property, after providing for the repairs and upholding of the same, and subject to the payment of the sum by the said will given to the Master and Wardens of the *Wax Chandlers' Company* for the time being, and to a proportionate increase of the said sum with reference to their share of the original rent of the property, and, without prejudice to any claim that may be made for a similar payment and increase of the other specific sums of 2*s.* and 2*s.* given by the will, ought to be applied for charitable purposes according to a scheme for the regulation and management of the charity to be settled by the Court, having regard to the directions contained in the will:

"Declare that the piece of land in the information mentioned purchased of *Deborah King*, in 1790, is not, nor are the buildings thereon, subject to the trusts of the said will, or part of the said charity:

"Declare that the boundaries of the said piece of land ought to be ascertained, and the said piece of land distinguished from the property of the said charity, and directions ought to be given by the Court for the future apportionment of the rents of the charity property and the said piece of land, or for the separation and division, at the expense of the Respondents, of the said property and piece of land, and the buildings thereon, unless the Court shall have laid before it, and shall approve of, proposals on the part of the charity, or of the Respondents, for the purchase of the said piece of land or of the charity property (as the case may be):

"Declare that the Respondents ought to account for rents and profits of the charity property since the filing of information, such rents and profits to be fixed, if necessary, by apportionment:

"With these declarations remit the case to the Court of Chancery, to do therein as shall be just and consistent with these declarations and this judgment."

LORD COLONSAY:—

My Lords, I cannot say that I have found this case free from difficulty, or that my opinion has not been in suspense during a considerable part of the argument. But, after very full consideration of the will and of the authorities, I have come to a conclusion satisfactory, at least to my own mind. In construing wills we are aided by certain general canons of construction which are well known; and as to wills which contain charitable bequests, certain rules and principles have been established which ought to be adhered to. This will is of that character; and the question which has to be determined upon a consideration of the whole of that document and of the authorities, is that which has been stated by my noble and learned friend who has just spoken.

The testator begins by giving certain houses to his own son and his heirs, and in default of such issue he directs that the *Wax Chandlers* are to have the houses "for this intent and purpose."

1873

ATTORNEY-GENERAL *v.* MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

What is meant by "this intent and purpose?" We find following that, what must clearly have been the inductive cause and object in the mind of the testator in making that devise, so far as regards putting the *Wax Chandlers' Company* in possession of these houses. We see that it was for the application of the rents of those houses to particular purposes, some, if not all of them, being charitable purposes. There are bequests to the poor of two parishes—the one being a parish in the county of *Kent*, in which the testator had property, and the other being the parish in *London* in which the tenements in question are situated. And, finally, he directs that "the rest of the profits of the houses and tenements shall be bestowed upon the reparations of the said houses and tenements."

Now upon this passage which I have read certain observations present themselves. In the first place, it is to be deduced from that passage that the payments which he appointed to be made were to be made from the rents of the subject, because he goes on to deal with "the rest of the rents and profits." Therefore it appears from this that the distribution was to be made out of those rents and profits. In the next place, it appears from this that he contemplated a surplus after making these payments, for he says that the surplus is to be applied to the reparation of the houses and tenements. It farther appears that he appropriated that surplus by saying that "the rest of the profits" are to be applied "to the reparation" of the houses and tenements. I think these three propositions arise clearly out of these words in the will.

It has been contended that there is an ambiguity, or a doubt, as to whether "the rest of the profits" could mean the whole remaining portion of the rents of the tenements, and a limitation has been proposed to be put on those words to the effect of holding that they mean the profits so far as may be required for the reparation upon a fair consideration of what that includes; and it is said that he could not have meant an express appropriation of the whole of the rents, because he did not know what these might be, and, indeed, could not possibly know it, because the time was so distant when this part of his will would come into effect. We cannot suppose that he did not contemplate that the *Wax Chandlers* might get the property, because he devises it to them in a certain event, and

having that in his mind he expressly declares what they are to do with the profits when they get them; and there is no part of the will more explicit in regard to this than the provision that the rest of the profits are to be bestowed upon the reparation of the houses and tenements.

It is said that it is unreasonable to suppose that a large amount of rents was intended to be so applied. Granted that the testator did not know what the exact amount of the rents might be—that it might be greater or less than would be sufficient for the purpose of the repairs; yet the fact is, that he desired them to be so applied. And when we remember that "reparation" is an expression which must be held to comprehend the restoration of the tenements in the event of any catastrophe befalling the buildings, and when we remember that the same institutions which exist now did not at that time exist for enabling parties to secure themselves against such catastrophes, I cannot think that it was unreasonable that he should devote a greater sum to be applied to reparation, or contemplate that a greater sum would be required for that purpose, than if the buildings had been secured against catastrophes, and there would be only casual repairs required from time to time. At all events he has used the expression "reparation," he has said in express terms that the "rest of the profits" are to be applied to that purpose. The object of putting a limitation on the amount of rents to be so applied is to bring the case within the category of cases where there is a residue not appropriated. But how can that be done where the testator in so many words appropriates the residue and by his will directs the whole of it to be applied in a particular manner? I therefore read this as a will which does deal with, and appropriates, the whole of the rents; and when we see that the rents are to be applied to charitable purposes, and that the rest of the profits are to be applied to maintaining those houses which are to produce the rents that are to be given to charitable purposes, we must regard that reparation as being itself part of the charitable object which the testator contemplates.

The other sentence which has been dealt with as being of importance, is that in which the testator directs that in the event of the company's failing to do any of the things he has desired to be done, his next of kindred shall enter into the houses "upon con-

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

dition" that they do those things. It is said that the word "condition" being here used, shews that he intended that his next of kindred, whoever they may be, should hold this property for themselves on the simple condition that they should keep the subjects in repair. I do not see that the word "condition" here introduced is to have that peculiar and technical signification. It is a word which may be perfectly consistent with words of trust; it is a word of popular application also, and I cannot hold that he intended it to be so applied as to limit the application of the rents in the event of the next of kindred taking the subject.

If that is not the necessary construction of this last clause, then the two arguments on which it was contended that the *Wax Chandlers* are to have any balance of rents for themselves fall to the ground. I think, therefore, that these two passages which are relied upon, the first as being ambiguous, and the second as throwing light upon the first, and clearing up its ambiguity, fail of the effect sought to be given to them in the argument. There are no precise words such as are required in order to take this case out of that class of cases to which I think it belongs. I think that the declaration that the rents are given for a purpose, and that purpose a charitable purpose, clearly indicates the leading object in the mind of the testator; and to that leading object he directs the application of the whole of the rents and profits of these houses and tenements, and he disposes of the whole of the residue in maintaining those houses and tenements. Under these circumstances I think that the judgment of the noble and learned Judges in the Courts below must fall to the ground.

On the other question, as to the property purchased, I think that seeing that there is an ambiguity here which might very well be in the minds of the Respondents, seeing that they may be held to have been acting in perfect *bona fides* in all that they have done, seeing that the view they took is strengthened by the opinions of two noble and learned lords of such eminence in the law as those who have had this case before them, I cannot think that the Respondents are to be dealt with as if they had been mal-administering the property. It appears to me, therefore, my Lords, that the proposition made by my noble and learned friend upon that subject is that which we ought to adopt.

1873.

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

LORD CAIRNS:—

My Lords, it appears to me that the difficulty, much more apparent than real, which has arisen in this case, has arisen from confounding together two classes of authorities upon subjects of this kind, which, in themselves, are perfectly distinct from each other. There is one well-known class of authorities of this sort. A testator devises to a corporate body or to an individual, landed property, and he affixes to that devise a condition that the corporation or the individual shall at their or his own peril, and if necessary out of their own funds, make certain payments, or a certain payment, to some object of his bounty. In a case of that kind the devisee is said to take the land upon condition. If the devise is accepted, the condition must be fulfilled, and the money must be paid, whether the land devised is, or is not, adequate to make the payment. The very statement of a case of that kind implies that the land is the land of the devisee, and that every accretion to the value of the land belongs to the devisee; and that the person or the charity which has the benefit of the condition, which receives the payment mentioned in the condition, has a right to nothing more than that payment. The other class of cases is of this kind. A testator devises property to a corporation, or to an individual, upon trust to apply the rents in a particular manner; and it comes to be a question of construction how the rents under those directions are to be applied; and on construing the will, questions arise as to whether the whole of the rents is, or is not, disposed of; and if all of them are not disposed of in form or in substance, farther questions arise as to what is to be done with the surplus, whether it is meant that the devisee is to have the surplus, or whether it is meant that the surplus is to enure to the benefit of the other objects mentioned in the devise. Cases of that kind are not cases of condition at all, they are cases where the beneficial interest in the land is portioned out among various objects; and the question is what those objects are. As was said by Lord *Kingsdown* in your Lordships' House in the case of the *Dean and Canon of Windsor* (1), there is the same difference between these two classes of cases as there is between a devise to

(1) 8 H. L. Cas. 369, 452.

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

A. upon condition that he makes a payment to *B.*, and a devise of land for the benefit of *A.* and *B.* together.

Now, my Lords, it appears to me that the confusion which has arisen in this case has arisen, as I said, from blending together the two classes of authorities to which I have referred; for I find that my noble and learned friend, the late Lord Chancellor (Lord *Hatherley*), in his judgment in this case expresses himself thus (1), and here it is that the condition becomes of importance to be considered: "Will you take a property subject to this condition? You have got to pay the £8 a year. If you do not pay the £8 a year, and if you do not keep the premises in repair, some one else will, but you must take it either for better or worse upon those conditions." Those words describe very clearly and distinctly a case of the first class of authorities to which I referred—a gift upon condition of making a payment; and it would appear, from reading those words, that the decision had been based upon the ground that the will now before us came under that class of authorities. But lower down the Lord Chancellor continues (2): "I cannot distinguish this case from that class of cases where specific gifts have to be dealt with, and nothing is said about the residue." That is the other class of cases, which has no connection whatever with the first. Therefore, resting upon this judgment, I should have been left in doubt as to which of the two classes of authorities the Lord Chancellor really intended to bring this case under. In a later decision of the Master of the Rolls, which afterwards came before the Court of Appeal, in the case of the *Merchant Taylors' Company* (3), the Master of the Rolls said that this former case of the *Wax Chandlers' Company* had been decided expressly and solely upon the ground that it was a gift upon condition, and not a gift upon trust.

That leads me to inquire which of these two descriptions is the proper description of this will. If the first be the proper description, if this be a gift upon condition, then the decision of the Courts below is unquestionably right, and the Respondents are entitled to the property, subject to making the payments. Now, when I turn to the will, what I find is this, the property is devised

(1) Law Rep. 5 Ch. Ap. 513.
(2) Id. Ib.
(3) Law Rep. 11 Eq. 35, and 6 Ch. Ap. 512.

in form to the *Wax Chandlers' Company*. The words "upon condition" no doubt occur in the devise, for it says, "for this intent and purpose, and upon this condition, that they shall yearly distribute eight pounds of lawful money of *England* after this manner." Then specific objects are mentioned, exhausting the £8; and then the devise continues: "And the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements." If your Lordships were to stop at the end of the first half of the sentence, "for this intent and purpose, and upon this condition, that they shall yearly distribute eight pounds of lawful money," it might be contended that it was a condition that they should make this payment, either out of the land, or out of their own money. But when you add the second half of the sentence, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparations of the said houses and tenements," you are driven, without any choice, to the conclusion that all the different payments are to be made out of the rents and profits, and that there is not a word in the devise making it obligatory upon the *Wax Chandlers* to pay a shilling if they have not got in their hands sufficient rents and profits arising from these houses and tenements. That at once removes the case out of the description of those cases which I mentioned first, viz., cases where a gift is made upon condition, even although the word "condition" is used, for if I give an estate to *A.* upon condition that he shall apply the rents for the benefit of *B.*; that is a gift in trust to all intents and purposes, although the word "condition" is used.

Then, my Lords, turning to the will as being governed, as it must be, by the second class of authorities, what do we find? Your Lordships find that the estate is vested in the *Wax Chandlers' Company;* that the rents are to be applied to objects which clearly exhausted the whole of the rents at that time, for it is wrong to alter the words of the residuary gift, and to say that the meaning is that so much of the rents as are necessary shall be applied towards repairs. Those are not the words that the testator has used. He has said, "the rest of the profits of the houses and tenements" shall be applied towards repairs; and it is perfectly clear, that whatever was the value of the property at the time,

1873

ATTORNEY-GENERAL v. MASTER, WARDENS, &C., OF THE WAX CHANDLERS' COMPANY.

whether it was a few shillings or a few pounds, more or less, the mind and opinion of the testator was, that the whole of those rents, after providing for the payment of £8 a year, would be required for the reparation, and, if necessary, the restoration, of the premises. The gift, therefore, is just as if he had said: "I, knowing the value of my property, am of opinion, that after a sufficient sum has been used for keeping the property in repair, there will remain a surplus of £8, and I wish those £8 to be divided in the following way."

My Lords, I ask the question, then, first, Is the whole of the rent applied specifically under this will? Clearly it is, the whole is exhausted. Is it to be applied for purposes other than the purposes of the *Wax Chandlers' Company?* Beyond all doubt, the specific payments amounting to £8 a year are not for the benefit of the *Wax Chandlers' Company.* It is true that the gift of the residue is what may be termed an impersonal gift. No name, no subject, no individual, is mentioned who is to receive the benefit; but for whose benefit is the property to be repaired? Is it for the benefit of the *Wax Chandlers' Company?* Clearly not, for these Respondents have no interest in the property beyond their interest as trustees. The object of the repairs is to keep the property in that fruit-bearing state which will produce the required payments amounting to £8 a year. In other words, the reparations are to be for the benefit, and for the purpose of the charitable gifts mentioned in the first part of the will.

If that is so, the whole of the income is dedicated by the will, and dedicated to purposes of charity, and the case ranges itself under that large and well-known class of authorities which declare that when gifts are made for charitable purposes, exhausting the whole of the rents at the time, any subsequent increase of the rents must be devoted to the same charitable purposes.

My Lords, the case appears to me an extremely simple one. I greatly regret the amount of litigation which has taken place with regard to this matter, from the hesitation and vacillation on the part of the Court, in this case. We hear that another suit has been instituted by another company to change the position of land which had been surrendered to charity under the pressure of the elder authorities. That suit has come to be heard by a primary

Court, and by a Court of Appeal. This suit has been heard by a primary Court and by the first Court of Appeal, and it is only now that a decree will be made consistent with the earlier authorities.

With regard to the minor part of the case, I can only say that it appears to me that there is no evidence whatever shewing that the property of this charity, specifically, was applied in the purchase of what has been termed the minor piece of land which was bought from *Deborah King*. It may well be that the Master and Wardens of the *Wax Chandlers' Company*, being under the impression that the surplus property was theirs, and having it along with their other funds, applied some part of it to that purchase; but there is no evidence ear-marking, tracing, or following the charity money into that purchase. Under those circumstances, to take possession of that new purchase for the purpose of charity would, as it seems to me, be nothing short of following the back rents (as they are termed) received by the charity and taking possession of them at the present time. Of course, in cases of this kind, it has not been the practice of the Court to follow back rents.

I am, therefore, of opinion, that the declarations which have been made by my noble and learned friend who spoke first, are, in substance, the declarations which we ought to make. I do not think it is the intention of your Lordships in placing these declarations, as we propose to do, in the hands of counsel, that there should be any farther argument upon them, but that any farther observation which it may occur to counsel on either side to make upon these declarations, should be handed in in writing.

Decree reversed with the declarations proposed by Lord Chelmsford.

Lords' Journals, 17th February, 1873.

Solicitor for the Appellant: *Fearon.*
Solicitor for the Respondent: *Horatio Gregory.*

1873
Feb. 27.

CHARLES L. F. GILES AND ANNA MARIA his Wife . . . . . } Plaintiffs in Error;

AND

ANN MELSOM (widow of JOHN MELSOM) . . . . . } Defendant in Error.

Will—"Same manner"—"So specifically devised."

A testator had three sons, *John*, *Thomas*, and *Robert*. He devised to each, in the same form of words, a separate property for life, and after a son's death to his child or children in fee. In case any one of the sons should die without lawful issue, the property of such son was to be divided equally between the two survivors "in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned." At the end of the three devises came the proviso in these terms: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises, so specifically devised to such one or more of them so dying, unto his widow and her assigns for and during the term of her natural life." The youngest son died unmarried. His two brothers divided his property between them. The eldest son died, and after him the second son, each leaving a widow, but no child:—

Held, that each widow was entitled to a life estate in all that had been possessed by her husband during his life.

The proviso is a limitation, and must be so construed. "Specifically" means the same thing, whether used in a devise of land or of chattels. "So" in this case is merely descriptive, and is the same as "hereinbefore." "So specifically" is therefore merely descriptive.

In this will the description was meant to apply whether the property was given directly, as in the first instance, or indirectly, as in the second instance.

The proviso being at the end of all the devises, must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only.

IN this case an action of ejectment had been brought by *Ann Melsom* against *Giles* and his wife (previously *Anna Maria Melsom*) to recover possession of a certain estate to which *Anna Maria Melson* claimed to be entitled for life under the following circumstances. By consent of parties, the question in the action was stated in a Special Case for the opinion of the Court of Common Pleas.

George Melsom the elder (the testator) died possessed of three

estates, at *Batheaston*, in *Somersetshire*, at *Bradford*, in *Wilts*, and at *St. Catherine*, in the county of *Somerset*. By his will, dated the 28th of June, 1842, he devised them to his three sons, *John*, *George*, and *Robert*, in the following manner:—

"I give and devise my farmhouse, lands, tenements and hereditaments situate at *Batheaston*, in the county of *Somerset*, and also one moiety of my farm, &c., called *Haugh Farm*, situate at *Bradford*, in the county of *Wilts*, unto my son *John Melsom* for his life, and from and after his decease unto and equally between all and every the child and children of my said son *John Melsom*, if more than one, their several and respective heirs and assigns, as tenants in common; and, if but one, then to such one child, his or her heirs and assigns, for ever: And in case my said son *John Melsom* shall depart this life without having any lawful issue, then I give and devise the same hereditaments and premises unto and equally between my sons, *George Melsom* and *Robert Melsom*, *in the same manner* as the estates hereinafter devised are limited to them respectively, subject, nevertheless, to the proviso hereinafter mentioned in case my said son *John Melsom* should leave a widow."

The testator then devised in the same terms other property at *Batheaston*, and the other moiety of *Haugh Farm* to his second son *George Melsom*—and in the same terms he devised to his third son, *Robert Melsom*, his property at *St. Catherine*, in the county of *Somerset*. Each of these devises contained, like the first, a gift to the surviving son or sons, of the property of the son or sons dying unmarried. This part of the will concluded with this proviso, referred to in each of the devises by the same words: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises *so specifically devised* to such one or more of them so dying unto his widow and her assigns unto and during the term of her natural life."

The testator died in June 1843, leaving all his three sons him surviving. His youngest son, *Robert*, died in September, 1848, a bachelor and intestate.

On the death of *Robert*, the two surviving sons, *John* and *George*, divided his property between them. The eldest son, *John*,

1873
GILES
v.
MELSOM.

died in July, 1861, leaving a widow (*Ann Melsom*, the present Defendant in Error) but no children; and *George* died in August 1867, leaving a widow (*Anna Maria*, now the Plaintiff in Error) but no children. On the death of *George*, *Ann Melsom*, the widow of *John*, claimed the moiety which had been held by *George*, alleging that on the expiration of his life estate it came to *John*, as heir-at-law of his father, being, in that event, undisposed of by the will.

The case was argued in the Court of Common Pleas, when Lord Chief Justice *Bovill* and Mr. Justice *Brett* held that *George's* widow took a life estate in the moiety of *Robert's* estate along with her life estate in the property originally devised to *George*. Mr. Justice *Byles* dissented, being of opinion that, on the death of *George*, the moiety he had enjoyed passed to the heir-at-law (1). In the Court of Exchequer Chamber the judgment was supported by Lord Chief Baron *Kelly*, Mr. Justice *Mellor*, and Mr. Justice *Blackburn*, but was reversed by the majority of the Judges there, consisting of Barons *Bramwell*, *Channell*, *Pigot* and *Cleasby* (2). The case was then brought up to this House.

Mr. *Manisty*, Q.C., and Mr. *Murch*, for the Appellant:—

The intention of the testator here was to give to each of the surviving sons the same interest in the deceased brother's property as he had given to each in the property originally devised. He carried out that intention by the use of a simple phrase, quite intelligible to every one—he gave one property "in the same manner" as he had given the other. He did not mean that there should be any distinction between the two properties when they fell into possession. He had no intention to die intestate as to any part of his property. He desired to make the same provision for the widow of each of his sons, and not to confine the interest of any widow to that property which had been originally devised to her husband, if by the accident of the death of one son unmarried, each of the surviving sons should succeed to a portion of that deceased brother's estate. Such portion was as specifically devised to each as was the portion originally allotted to him; and his widow succeeded for her life to all his interest. The word

(1) Law Rep. 5 C. P. 614. (2) Law Rep. 6 C. P. 532.

"specifically" was only a word describing what the testator had done as to one property, and referred to what he had so done as to the one, in order to shew what he intended to do as to the other. Put into a common form of speech, the will meant this—I have given some property specifically to each of my sons. If one of them should die unmarried, I desire that the others should divide the dead man's property between them, and each hold his share of the property in the same manner as he held the property originally devised to him, and that his widow shall have a life estate in it in the same manner as she has a life estate in the property originally devised to her husband.

The following authorities were mentioned: *Jarman* (1); *Broom's* Maxims (2); *In re Palmer* (3); *Doe* d. *Woodall* v. *Woodall* (4); *Ross* v. *Ross* (5).

Sir *J. Karslake*, Q.C., and Mr. *Garth*, Q.C. (Mr. *Biron* was with them) for the Respondent:—

It is the proviso which gives the life estate to the widow—it is, therefore, in the language of the proviso that the real extent of the gift is to be ascertained. Now the words of the proviso are, "in case either of my sons shall leave a widow I give the hereditaments and premises so specifically devised, unto his widow for life." The gift to the widow is really restricted to those specifically devised hereditaments, the restriction being plainly and directly created by the words "so specifically devised." Those words operate like the naming of a person, and they fix the identity of the thing devised. There was but one property specifically devised to each son, and all that the will says is that if a son should succeed to half of his brother's portion he shall enjoy it as his brother did, and in the same manner. The will carries that property no farther. "So" is a word of reference to a preceding clause of the will, and can have no meaning, nor will the word "specifically" have any meaning if not thus construed, yet a meaning must be assigned to both these words. It is impossible

(1) 3rd Ed. vol. i., p. 710; vol. ii. p. 661.

(2) Page 599, referring to Co. Lit. 159 a.

(3) 3 H. & N. 26.

(4) 3 C. B. 349.

(5) 2 Coll. C. C. 259; see also *Ord* v. *Ord*, Law Rep. 2 Eq. 393.

1873
GILES
v.
MELSOM.

to strike them out of the will. Each of them is important; and taken together they exactly describe certain hereditaments, and shew that those so described were alone indicated and intended by the testator to pass to the widow. The rest of the property was left to follow the usual course of descent. The testator never intended to describe by the words "so specifically devised" an estate depending on a double contingency, the death of a brother, and his death without lawful issue.

Mr. *Manisty* replied.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, in this case we have the opinions of the Judges, in the two Courts before which the case has come, equally divided upon the construction of the will; but I am happy to think that there is no similar division of opinion in your Lordships' House. My judgment certainly is that the Appellants are right, and that a careful adherence to the ordinary and settled principles of construction will necessarily lead to a decision in the Appellants' favour. The case may well be decided upon the construction of the proviso taken by itself, and without assuming one way or the other the effect of the words of reference which are in an earlier part. So put, it turns entirely upon the meaning of the words "so specifically devised."

This will contained a gift to each of the testator's three sons, for their respective lives, of certain property described upon the face of the will. In the event of any one or more of those sons dying without leaving issue, there was a gift over to the survivors; but that gift over was subject to be intercepted and postponed by the operation of this so-called proviso, that "in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises *so specifically* devised to such one or more of them so dying unto his widow and her assigns for and during the term of her natural life." We have to deal with that very case. One of the sons never married, but died leaving his two brothers surviving. Each of those brothers, under the operation of those parts of the will about which there was no controversy, became entitled upon his death to a moiety of

that property which in the first instance had been given to him for life. The words which gave that right to the brothers were words which said, that in the event which in *Robert's* case happened, namely, his dying without leaving lawful issue, "the same last-mentioned hereditaments and premises," being the particular property which had been described in this will by the description of "my farm, messuages, lands, tenements, and hereditaments, with the appurtenances, situate, lying, and being in the parish of *St. Catherine*, in the said county of *Somerset*," were given over to the two brothers for their respective lives, and given over to them "in the same manner" as the estates which had been directly, or in the first instance, devised to them respectively.

Now the words here say that if either of those sons should die leaving a widow, which has happened as to both of them, then the testator gives the hereditaments and premises so specifically devised to the person so dying, to his widow for her life, or their widows for their lives. What are the hereditaments and premises so "specifically" devised? All the devises precede that proviso in the will; all of them are devises of property identified by particular descriptions; and, in the events which have happened, the property which, in the first instance, had been given to *Robert*, had, by virtue of the gift in the preceding part of the will come to the two brothers, to be held by them "in the same manner" as the estates originally given to themselves.

Now, what does the word "specifically" mean? I should have thought that it was one of those words in our language which have an exact and accurate meaning well known to the law; so well known that it may almost with propriety be called a technical word of legal language. A specific devise, or a specific bequest (for the word "specific" means exactly the same thing, whether it be applied to land or to chattels, to heritable estates, or to leaseholds) is a devise or bequest by a description which identifies a particular subject then existing as intended to pass to the donee in specie. Mr. Baron *Channell*, in his judgment—and I cannot name that learned Judge without expressing the feeling of regret which I am sure all your Lordships, and all who are acquainted with the administration of the law in recent times, must feel at the loss we have sustained by his removal from among us—Mr. Baron *Channell*

1873
GILES
v.
MELSOM.

adopts this view, and says that the word "specific" with this meaning applies with propriety to this gift, because the lands were devised by particular description. And Lord Chief Baron *Kelly*, in two passages of his judgment, with great accuracy says, that that is both the legal and the natural meaning of the word. In this case the legal meaning comes from the natural meaning, and the natural meaning happens to be exact and definite. It is quite clear that this is property defined by specific description existing at the date of the will, and not less so whether it be given directly and in the first instance, or indirectly and in the second instance. The only question which arises is, whether the devise has taken effect upon it? It has taken effect upon it specifically by virtue of that specific description.

I said that the word "specific" was exactly the same in its meaning whether applied to land or to personal estate. It used to be said (and the Chief Baron takes notice of it) that every devise of land is a specific devise. In the old state of the law that was so, because, by law, no land could pass by a will of which the testator was not seised at the time he made the will; and, therefore, however general the form of expression, it was applicable only to a particular subject identified by the words of description and in existence at the date of the will. I apprehend that that is no longer the case, even as to real estate, in the present condition of the law, which enables a man by general words to give that which he has not at the time when the will is made. Therefore it is no longer necessary that the will should contain specific words applicable to a particular subject in existence at the date of the will, but it is sufficient if it contains words expressive of the same kind of intention which is expressed by a residuary gift of personal estate, namely, that whatever the testator may happen to have, which he is capable of disposing of, answering to the description of realty, shall pass under the will. At the same time it is not necessary to dwell upon any nice or technical criticism in that respect; because, assuming that every devise of real estate is specific, unless we deny the truth of the proposition which I have just stated as being universally true, the words are properly applicable to such devises, and when applied to such devises, they express not an unmeaning thing, but a thing which

1873
GILES
v.
MELSOM.

has a true meaning, even if it be universal, with respect to a particular class of gifts.

My Lords, I cannot but think that it is of very great importance to adhere to the rule that words are to have their natural signification, and that legal and technical words are to have their legal and technical signification, unless there be something in the context of a particular instrument to shew the contrary. What is there in the context of this particular instrument to shew the contrary? It is not very clear; but dealing with these words as they stand, they seem to me to speak for themselves and to involve no difficulty of construction. I am led to follow the argument as to the general scheme of the will. It is, I venture to say, a perilous and hazardous argument in most cases where it is used. I do not say that there are not cases in which it may be properly used, but certainly it is an argument which seeks to escape from the necessity of grappling with the meaning of particular words upon grammatical principles, and endeavours to get into a region of speculation as to the probable intent of the testator. There are cases in which the ambiguity of particular expressions is such that there may be no better mode than that for their construction. But those are not cases one would desire to follow, except where there really is an ambiguity of that kind. However, if I were to attempt to follow the learned counsel in that line of argument, I should say that the general scheme of this will would not lead me to the conclusion that it was intended, as against the widow in this particular case, to separate from the property originally given that which the testator had added to it, by words, saying that it was to be held in the same manner as the estates previously devised. So far as there is a scheme here, it does not shew any disposition to deal with that which is added, differently from that which was originally given, as against the devise for the children of the sons. If the words by which the addition is made may admit of some doubt as to whether they would go beyond the sons themselves (I do not say that they do, but it is not a point which it seems to me necessary for us now to decide) certainly the probable intention is, that they were meant to provide for the children as well as for the parents. And if they were meant to provide for the children as well as for the

1873
GILES
v.
MELSOM.

parents, I can find nothing in this will leading to the conclusion that there was any intention to draw a line adversely to the widows in that case. Therefore, looking through the will, I can see no context which at all requires or justifies a departure from the proper sense, as I understand it, of the words "so specifically devised," which, coming where they do, include everything which had been previously given.

Two arguments were relied upon by the Respondents. First of all it was said that this clause being in the shape of a proviso, ought really to be split up into three clauses, and read in that form into earlier parts of the will, with the effect of making the words, "so specifically devised," receive from the context a more limited application than that which they would receive in the place where they occur. That is a singular mode, certainly, of dealing with the construction, to transpose, without necessity, words from the place where they occur, in order to make a word of reference that is found with them, namely, the word "so," in "so specifically devised," apply to a different subject from that to which it would naturally apply where it is found. Of course, if you put into the clause immediately after the first gift of the estate to *John*, the the words "so specifically devised," in that place, they could only apply to those estates. But you do not find them there. You find them at the end of all the devises; and I quite agree with what Mr. Justice *Byles* said, that you must deal with them according to the place where you find them, and not according to the supposition that they are somewhere else. So, dealing with them, it appears to me that the words "so specifically devised," mean the same as if the phrase had been "hereinbefore specifically devised;" and, reading it so, I am obliged to inquire whether any reason can be suggested why the testator put it in that place instead of distributing it over other places in the will in the way which has been suggested. I should say the reason was in order to avoid any question as to the way in which the property was to be included, and as to its covering everything. It appears to me that that is its effect.

I do not wish to dwell upon the effect of the words, "in the same manner as the estates herein devised are limited to them respectively." I cannot, however, but say, upon that, that it

seems to have been all but conceded in the arguments of the Respondent, and all but decided, certainly assumed, in the opinions of the learned Judges who were in favour of the Respondent, that those words of reference would have the effect of making the sons tenants for life with remainders to their children, of what they took over under those words. If so, it is wholly impossible that they should not also have the effect of carrying the estate given over, through all the limitations which had been declared, of the estates originally given. And I must confess my total inability to follow the argument, that the limitation is the less a limitation because it is introduced by the word "provided," and occurs in a different part of the will from the other limitations in connection with which it is to be read ultimately, according to its legal effect.

The whole argument for the Respondent, if I may say so respectfully, seems to me to lose sight of the cardinal rules of construction, which are, that where you have got words which are sensible and intelligible in their proper and natural meaning, especially if they are words of Law and words of Art, they are not by any uncertain conjecture to be wrested or diverted from that meaning. You must have clear interpretative words in some other part of the will, which make such a construction necessary, in order to put upon them another than their proper sense. As to its being necessary to do that in order to make them effective, in the sense which the argument for the Respondent requires, I must demur wholly to the principle. If the words, "so specifically devised," were not according to their true meaning applicable to the particular estates, then we must search for some other meaning for the word "specifically" which would make them applicable. But being applicable, it is no argument to say that, if the word "specifically" had been left out, we should still have known from the rest of the will that these were specific devises. You might just as well say that the words, "without leaving any lawful issue," must receive some other and definite construction, because if the word "lawful" had been left out they would have meant the same thing. Nothing can be more mischievous than the attempt to wrest words from their proper and legal meaning only because those words are superfluous. Here the words have a meaning; it

1873
GILES
v.
MELSOM.

is an accurate meaning, a well-known meaning, a legal meaning, and a meaning which in the present case can receive effect without the slightest difficulty; and I totally disagree with the opinion that you are to depart from that meaning, and search for some other meaning, merely because the sense would have been practically the same if the words had been left out.

I must, therefore, advise your Lordships in this case to reverse the judgment of the Court below, and to give judgment in favour of the Appellants.

LORD CHELMSFORD:—

My Lords, I entirely agree with my noble and learned friend in the opinion he has expressed. I should have considered this case to be one perfectly clear of doubt, if it had not been for the difference of opinion which has existed amongst the learned Judges in the Courts below, and for feeling that there are five very learned Judges who have a different opinion to that at which I have arrived.

Without offering any opinion with regard to what may have been the general scheme of the will, I think it will be sufficient for my purpose to state that it is perfectly clear to my mind that it was the intention of the testator to deal with all his three sons in the same manner, and to give them their different estates exactly upon the same terms. The devise to *John* may be considered as the type of all the rest. What was the nature of the devise of the particular estate to *John?* It was to him for life; then (as the proviso in favour of the widow must be considered as a limitation) to the widow for life, and afterwards to the children in fee. Then comes what may be called a contingent devise to *George* and to *Robert*, and it is in these terms: "in case my said son *John Melsom* shall depart this life without leaving any lawful issue, then I give and devise the same hereditaments and premises unto and equally between my sons *George Melsom* and *Robert Melsom*, in the same manner as the estates hereinafter devised are limited to them respectively."

Now we will take the devise to *George*. What is that devise? The devise of the estate to *George* is exactly the same as the devise of the estate to *John*. It would be to *George* for life, to his

widow for life, and afterwards to his children; and then every devise is followed by the words "subject, nevertheless, to the proviso hereinafter mentioned in case my said son *John Melsom* or *George* or *Robert* should leave a widow." Then this contingent devise is made to *George* (I am taking *George* at present as being the only important one) "in the same manner as the estates herein devised are limited to them respectively." And having shewn that the devise to *George* was to him for life, to his widow for life, and to his children, then if the contingent estate is limited to him "in the same manner" as the estates devised to him, of course it must be of the same nature; that is to say, to him for life, to his widow for life, and to his children.

Some question has been raised with regard to that contingent devise extending to the children of *George* and of *Robert*, but it appears to me that it will be almost unnecessary to consider that question, because whether it extends to them or not, it appears to me that the proviso will undoubtedly give a life estate in the estate contingently devised to the widow of *George*.

Now all the devises, as I have already mentioned, terminate with a reference to the proviso in favour of the widow. That proviso is "that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying unto his widow and her assigns for and during the term of her natural life." Some of the learned Judges have dwelt upon the word "specifically" in this sentence, and have held that it applied to the estates originally devised, and did not extend to those which were contingently devised. But really there seems to me to be no reason whatever for that conclusion, because, are the estates which are contingently devised less specifically devised than the estates originally devised? The same estate which is originally devised to each of the sons is afterwards contingently devised and specifically devised to the other two sons. Then if that be so, whether the limitation applies to the children or not in the case of the contingent devise, the words of this proviso appear to me to apply in terms to the devise over (the contingent devise) to *George* and *Robert*, because it is "in case any or either of my sons shall depart this life leaving a widow" (the case of

1873
GILES
v.
MELSOM.

George), "then I give the hereditaments and premises so specifically devised" (the hereditaments and premises specifically devised are clearly partly those which are contingently devised) "unto the widow and her assigns for and during the term of her natural life." All these circumstances have occurred in the case of *George*, and therefore this limitation in favour of the widow appears to me clearly to attach to her; and consequently I agree with my noble and learned friend that the judgment of the Court of Exchequer Chamber must be reversed.

LORD COLONSAY concurred.

Judgment reversed; and judgment given for the Plaintiffs in Error, with directions that the Plaintiffs in Error "be restored to all things which they have lost by reason of the said Judgment of the Exchequer Chamber."

Lords' Journals, 27th Feb. 1873.

Attorneys for Plaintiff in Error: *Young, Maples, Teesdale, Nelson, & Co.*

Attorneys for Defendant in Error: *Merediths, Roberts, & Mills.*

JAMES MURRAY, T. H. McCONNEL, AND P. R. FALKNER . . . . . } APPELLANTS;

AND

FRANK WHITTAKER BUSH . . . . . RESPONDENT.

1872
July 19, 23, 26, 29.
1873
May 5.

*Contributory—Directors—Transfer of Shares—Irregularity—*7 & 8 *Vict. c.* 110—*Costs.*

A joint stock company was registered under the 7 & 8 Vict. c. 110. Certain clauses in its Deed of Settlement required that a holder of shares desirous of transferring them must give notice thereof to the officer of the company; that the directors at a board meeting must certify their approval of the proposed transferee; that the transferor must execute a deed of transfer; and that every transferee, approved of by the directors, must, within one calendar month execute, at the office of the company, or at such other place as the board should reasonably require, a deed of covenant to abide by the rules and regulations of the company "whereupon such person shall become a shareholder of the company." *B.* held shares in the company, and was a director; he desired to transfer his shares; he gave no notice—no certificate of approval was given before the transfer (it was alleged that such certificate was given after the transfer); a deed of transfer was executed, but no deed of covenant as required by the articles of the association was ever executed:—

Held (*diss.* LORD CHELMSFORD and LORD COLONSAY), that the transfer thus made, though irregularly, was not invalidly made, and the persons then known as directors having at a meeting of shareholders recognised the transferees as shareholders, and having then and there declared them to be elected as directors, and the shareholders at such meeting having accepted them as directors, the validity of the transfer to them and their title to office could not afterwards be impeached:

Per LORD CAIRNS:—The clauses in the deed are affirmative clauses—the objection as to the non-execution by the transferee of the deed of covenant is cured by the 30th section of the 7 & 8 Vict. c. 110. The moment the transferee assumed to act as a director, and allowed himself to be returned as a shareholder, he lost all right to question his liability.

Per LORD CHELMSFORD:—A transferee of shares may be estopped from disputing his liability as a shareholder, and yet his ownership of the shares may not qualify him for holding office in the company. The 30th section of 7 & 8 Vict. c. 110, does not apply to this case.

Held, also (*diss.* LORD CHELMSFORD and LORD COLONSAY), that the transfer made under these circumstances was sufficient to relieve the transferor from liability to become a contributory:

The directors had no power to dispense with the execution, by the transferee, of the deed of covenant—the only discretion they possessed as to such deed related to the place of its execution.

By one clause of the deed of settlement it was provided that if losses should absorb not only the reserve fund, but also 80 per cent. of the capital

1872-3
MURRAY
v.
BUSH.

subscribed for, "the company shall be *ipso facto* dissolved, and the directors shall within twenty days (and they are hereby required so to do) call a special general meeting of the shareholders, and lay a statement of the affairs of the company before such meeting." A report of an accountant specially employed by the directors shewed that such losses had occurred. No special meeting was called, nor at the next general meeting (which occurred shortly after the date of the report) was the report laid before the shareholders, but the business of the company was continued. At the general meeting of that year the report was not laid before the shareholders, but they were informed that the increased claims upon the company had so reduced the margin of profit that the directors could not recommend the payment of a dividend. At the next general meeting the shareholders were told that three new directors had been elected, but they were not told that three of the old directors had retired, and that their transferred shares constituted the qualification upon which the new directors had been elected:

Held (*diss.* LORD CHELMSFORD and LORD COLONSAY), that these circumstances, though entirely irregular, did not invalidate the proceedings of the directors.

Per LORD CAIRNS:—The allegations of facts in this case were not those which should have formed the ground for a proceeding to settle contributories; if true they constituted a case for relief of a wholly different description. The case shewed the great advantage of the use of some form of pleading.

In the Court of the Master of the Rolls the transfer had been held to be invalid, and the transferor liable to be made a contributory. By Lord Chancellor *Hatherley* this decision had been reversed. In this House the judgment of the Lord Chancellor was sustained; but, on account of the differences of opinion, and the irregularities of the proceedings in the transfer (though no fraud was established), no costs were given.

THIS was one of the cases arising out of the winding-up of the *Agriculturists' Cattle Insurance Company*. That company was, on the 1st of September, 1845, registered under the provisions of the 7 & 8 Vict. c. 110 (1).

In the month of January, 1854, the Respondent *Bush* became the owner of 100 shares of £5 each in the company; he was shortly afterwards appointed one of the directors of the company, and held that office till he finally transferred his shares. In April, 1856, he (in common with two other persons) advanced to the company a loan of £4000, and a farther sum of £500, the repayment of which was secured by bonds, of which, before July, 1856, *Bush* became the sole owner. In that month 300 additional shares in the company were allotted to him. As these shares fully paid-up were of the nominal value of £1500 that sum was written off the debt of £4500 due to him upon the bonds, which were

(1) See the history of this company in the cases referred to in p. 41, n.

then delivered up to be cancelled, and a new bond for £3000 was executed. In consequence of some pressure upon the company's funds in January, 1858, the directors, of whom *Bush* was then acting as one, in the month of February, 1858, passed a resolution to "employ Mr. *Evans* the accountant" to examine the company's books and "prepare a statement" thereon. One of the accounts consisted of a list of debts owing by the company, and included the £3000 due to *Bush*. Mr. *Evans* prepared, and on the 19th of March, 1858, laid before the directors, a report and a statement of accounts. His report set forth "that the statement of affairs shews a deficiency or loss to the 31st of December 1857, (including policy risk, estimated at £16,129) of £43,673. The paid-up capital amounts to £22,785, and the deficiency therefore, exclusive of capital, is £20,888, or £6068 in excess of the unpaid subscribed capital. On the other hand, you have the value of the business created, with its widely-extended connections; and although I can offer no opinion upon the amount at which this should be stated, there can be no doubt that the present organisation, which would necessarily cost a large sum, must be valuable either in transfer to another company, or as a basis for farther operations, the groundwork for a more extended and it is to be hoped a more profitable business." The report stated that the books had been kept "upon the principle of double entry carried out with the utmost integrity;" but that in such a business that mode of keeping them afforded no real information of the relation between profits and liabilities. This report was not communicated to the shareholders. The 191st clause of the deed of settlement provided that "if ever the losses of the company shall have absorbed not only the whole of the fund called the Reserved Fund, but also 80 per cent. on the gross amount of the capital subscribed for, the company shall be *ipso facto* dissolved, and the board of directors for the time being shall within twenty days, or as soon after such losses being incurred as the said board possibly can, and they are hereby required to call a special general meeting of the shareholders in such manner as hereinafter mentioned, and lay a statement of the affairs of the company before such meeting." No such meeting was called, or statement laid before the shareholders, but a meeting of the directors was held, at which the chairman and Messrs. *Fitzpatrick* and *Bush* were appointed to examine the

1872-3
MURRAY
v.
BUSH.

balance-sheet of the company. The secretary assented to a reduction of £300 from his annual salary, reducing it from £800 to £500 a year, and the attendance fee of a director was reduced from three guineas to one guinea. In April, 1858, *Bush* transferred to one *Hughes* the bond debt, making *Hughes* a trustee thereof for his, *Bush's*, benefit. An account of the receipts and expenditure was in April, 1858, laid before the directors; but it had been prepared by *Bush* and *Fitzpatrick* in the unscientific way declared by Mr. *Evans* the accountant to be unsatisfactory, as not shewing the real position of the company carrying on this peculiar business. In that year the directors stated that, as the increased claims on the company had reduced the margin of profits, they did not recommend the payment of any dividend. Shortly afterwards *Hughes*, the trustee of *Bush's* bond, applied to the directors to give him a promissory note for the £3000 and interest, and a promissory note at twelve months' date was accordingly given him.

There was a general annual meeting held on the 9th of April, 1859, but no allusion was made thereat to any sale or intended sale of shares by any of the directors.

On the same 9th of April, 1859, *Bush* transferred all his shares in the company to one *Morrison*, who was then announced to the meeting as a director; but there was no formal declaration of *Bush's* retirement from the direction, and he sat as a director at a meeting on the 11th of that month of April. Two other persons were also announced as new directors, but nothing was said as to the transfer of the shares which constituted their qualification, nor as to the old directors having dispensed with the rule which required a proprietor to have held his shares for a certain specified time before he became eligible to be made a director.

A notice of an intention to transfer shares is required by the 177th clause of the deed of settlement. There was no entry shewing such notice to have been given by *Bush*, nor was there any certificate of approval by the directors of such transfer produced. *Bush*, however, alleged that such approval had been duly given, but that he had lost it. *Morrison* (and two other persons transferees of other shares) had never executed the deed of settlement, nor had these persons become qualified according to the provisions of that deed to be directors. On the 11th of April, 1859, notice of the transfer of *Bush's* shares to *Morrison* was sent

to the Registrar of Joint Stock Companies, and was signed by *Bush* himself in his character of a director of the company; but the irregularity of this notice being discovered, another notice to the same effect, signed by other directors, was sent in. *Morrison* had since become bankrupt and died. On the 29th of October, 1859, *Hughes* brought an action against the company on the promissory note for £3000, and signed judgment thereon upon the 17th of April, 1861.

On the 20th of April, 1861, a winding-up order was made. The Appellants were the executors of *Thomas Houldsworth*, deceased, and by Order of this House, dated the 26th of June, 1868, had been put upon the list of contributories (1). They alleged that they had since, but not earlier than November, 1869, discovered the circumstances of the transfers by *Bush*, and the irregular manner in which those transfers had been made, which made them insist that *Bush* should also be put upon the list of contributories. In February, 1870, they took out a summons for that purpose. This summons was heard before the Master of the Rolls on the 27th of May, 1870, when his Lordship made the Order prayed for. On appeal to Lord Chancellor *Hatherley* this Order was, on the 19th of December, 1870, discharged (2).

This appeal was then brought.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Lindley*, Q.C. (Mr. *Westlake* was with them), for the Appellants:—

The directors, of whom *Bush* was one, after receiving Mr. *Evans'* report, were bound to communicate it to the shareholders. Instead of doing so they concealed it, and so misled the shareholders as to the real condition of the company, and prolonged its existence when it was clear that it had fallen into difficulties of the most serious kind. This was not only a breach of general duty on the part of the directors, but it was a direct violation of the express provisions of article 191 of the deed of settlement, and affected

(1) *Houldsworth* v. *Evans*, Law Rep. 3 H. L. 263; see also *Spackman* v. *Evans*, Id. 171; *Evans* v. *Smallcombe*, Id. 249; and this case in the Court below, Law Rep. 6 Ch. Ap. 246.

(2) Law Rep. 6 Ch. Ap. 246, where the facts are set forth in detail, and extracts are given from the articles in the deed of settlement. As the facts of this case are minutely referred to in the judgments of the noble and learned Lords, it was deemed inexpedient to give more than a mere sketch of them in the opening statement.

1872-3
MURRAY
v.
BUSH.

the very foundation of all the subsequent acts of the directors. The subsequent transfers of *Bush's* shares could only be accounted for by his desire to escape from an insolvent concern, and the mode in which these transfers were effected was so irregular as to make the transfers absolutely invalid. The transfers were made without the notices required, without the approval given, without the proper forms being observed by the incoming shareholders, the transferees, who had not held their shares a sufficient time to be eligible as directors, and never executed the deed of settlement, and were never therefore legally shareholders, and the whole of the arrangement was concealed from the knowledge of the shareholders, who at the general meeting were told that new directors had been elected, but were informed of nothing else, though in fact those new directors had only been elected (and irregularly elected) in the place of those who, having parted with all their shares, had become incapacitated to remain as directors. All these things were concealed from the shareholders in order to enable *Bush* to dispose of his shares, and escape from the liability which attached to him. Now it was particularly the duty of *Bush* as a director to see that the articles of the association were duly observed: he knew them; it was impossible that he could plead ignorance of them; it was his duty to enforce them, yet in his case all of them had been disregarded. The result was, that as these shares had not been transferred *bonâ fide*, but, as all the circumstances shewed, in pursuance of a scheme to relieve *Bush* from liability, and in utter violation of the terms of the articles of association, the transfers must be held to be bad, the transferees had never lawfully become members of the company, and *Bush* must be placed on the list of contributories. *Ex parte Brown* (1); 17 & 18 Vict. c. 110, s. 27; *Wilkinson* v. *The Anglo-Californian Gold Mining Company* (2); *The Galvanized Iron Company* v. *Westoby* (3); and *Hay* v. *Willoughby* (4) were referred to.

Mr. *Amphlett*, Q.C., and Mr. *Roxburgh*, Q.C. (Mr. *George Curtis Price* was with them), for the Respondent:—

There is no pretence for suggesting fraud or the working of a scheme in this case. The Respondent advanced his money to the

(1) 19 Beav. 97.
(2) 18 Q. B. 728.
(3) 8 Ex. 17.
(4) 10 Hare, 242; 22 L. J. (Ch.) 249.

1872-3
MURRAY
v.
BUSH.

association, and held his shares in it, in the full belief that it would be prosperous. He had been offered a sum in cash for his shares, and had refused the offer (1), though his acceptance of it at the moment it was made would have given him a considerable sum in ready money, and would have relieved him from all liability, and from the possibility of such imputations as have since been sought to be made against him. If the requirements of the articles of association were not complied with to the letter, they were complied with according to the practice which had been followed in the association as to all shares and transfer of shares during its existence. There never had been an exact observance of the directions in the deed of settlement as to the transfer of shares. There was no doubt as to the *bona fides* of the transaction. The Master of the Rolls had declared that, but he thought that the irregularities in the mode of making the transfers had affected the validity of those transfers. That was a mistake. What were the irregularities? They were not such as to affect the validity of the transfers, which had all been recognised not only by the directors, but by the shareholders themselves, who at public meetings of the company had accepted the transferees as directors; and, at all events, if they did not execute the deed of settlement they executed the deed of transfer which fixed them with liability as shareholders, and they were duly returned as such to the office of the Registrar of Joint Stock Companies. *Jessop's Case* (2), *Straffon's Executor's Case* (3), *Heward* v. *Wheatley* (4), *Burnes* v. *Pennell* (5), *Bargate* v. *Shortridge* (6), *Turquand* v. *Marshall* (7), *Jessop's Case* (8), and *Morris* v. *Cannon* (9), were cited.

1873
May 5.

LORD CHELMSFORD:—

My Lords, the question raised by this appeal is whether the Respondent *Bush* is liable to be placed upon the list of contributories in respect of shares which he held in the *Agriculturists' Cattle Insurance Company*, after the sale and execution of a deed of transfer of them to the purchaser Mr. *Peter Morrison*.

(1) This matter is fully referred to the judgment.
(2) 2 De G. & J. 638.
(3) 1 De G. M. & G. 576.
(4) 3 De G. M. & G. 628.
(5) 2 H. L. C. 497.
(6) 5 H. L. C. 297.
(7) Law Rep. 4 Ch. Ap. 376.
(8) 2 De G. & J. 638; 27 L. J. (Ch.) 757.
(9) 4 De G. & J. 581.

1873
MURRAY
v.
BUSH.

The Appellants contest the validity of the transfer on the ground of substantial departures from the requirements of the deed of settlement upon the transfer of shares, and of *Morrison's* omission to do all that was necessary to be done in order to discharge the Respondent from his liabilities in respect of the shares.

The deed of transfer was executed on the 9th April, 1859, and was expressed to be made in consideration of £2000, payable on certain events, which were afterwards stated by agreement to be, that the £2000 were not to be paid till the 11th of April, 1863, unless the company paid a dividend of 5 per cent before the 11th of April, 1861, and that in the event of the company being wound up before the 11th of April, 1863, (which happened,) nothing was to be paid.

Some remarks were made upon this agreement in impeachment of the *bona fides* of Mr. *Bush*; but it must be observed that he refused an offer from *Morrison* of £1 10*s.* a share to be paid immediately, and was content to accept terms which involved the risk of losing the whole of the price of his shares. On the other hand the nature of the agreement indicates an opinion that the company was not unlikely to fall into difficulties, which from the facts in the knowledge of Mr. *Bush* he might reasonably have been led to anticipate. These facts, so known to Mr. *Bush* and also to the other directors of the company, but which were not communicated to the shareholders, appear to me to have an important bearing on the question of the validity of the transfer of the shares in question.

In the year 1858 the company was not in a satisfactory state, and Mr. *Evans*, an accountant, was employed to investigate its affairs. It was said that the duty required of him must have been a very slight one, as he was to receive only £10 for his services. But there can be no doubt that he was to ascertain and to inform the directors what was the actual state of the company; and the statement of accounts which accompanied the report made by him could not have occupied much of the time of an experienced accountant.

The report itself disclosed to the directors this unsatisfactory condition of affairs, that the losses sustained by the company had absorbed 80 per cent on the gross amount of the capital subscribed for. Now by the 191st clause of the deed of settlement it is

provided that if ever losses to this extent shall occur "the company shall be *ipso facto* dissolved, and the board of directors shall, within 20 days (and they are thereby required so to do) call a special general meeting of the shareholders and lay a statement of the affairs of the company before such meeting." I agree with the remark made in the course of the argument that it is difficult to understand the meaning of the words "*ipso facto* dissolved." But it is clear that by this clause the directors were required, and it was their duty, to call a special meeting of the shareholders, and lay the statement of the affairs of the company, which they had procured for their own information, before such meeting. No such meeting was called, but as the annual general meeting was near at hand this might have been considered unnecessary. But whether at a meeting specially called, or at the annual general meeting, it was the bounden duty of the directors to bring Mr. *Evans's* report to the knowledge of the shareholders.

It was argued that 80 per cent of the capital had not been absorbed by the losses, because the goodwill of the company had not been taken into account by Mr. *Evans*, although he states in his report, as against the losses, the value of the business created with its widely extended connections, which (he says) "must be valuable either in transfer to another company, or as a basis for farther operations." I do not stop to inquire whether the directors had or had not a right to calculate the value of the goodwill for the purpose of shewing that the capital had not been absorbed to the extent of 80 per cent. But assuming that the goodwill is to to be taken into account, and that it has the effect of reducing the percentage of absorption of the capital below 80 per cent, I cannot understand how this can afford the smallest excuse for the directors having withheld Mr. *Evans's* report from the general meeting. For what were they bound to do under the deed of settlement? By the 105th clause they were to make up to the 31st of December in every year a fair, accurate, full, and explicit statement, account, and balance sheet, shewing clearly and justly the debts, credits, and liabilities, and the profits, gains, and losses which had been made or incurred by the company. And by the 165th clause they were to produce at every annual meeting a report of the receipts and disbursements for the year preceding, and of the particulars and amount of the funds or property of the

1873
MURRAY
v.
BUSH.

company, and of the state or condition thereof. Can it be said that the directors had performed their duty when they withheld from the shareholders a report which they had obtained expressly for the purpose of ascertaining the state and condition of the company?

In judging of the conduct of the directors towards the shareholders, I am compelled to express my opinion that they not only kept back information which they were bound to furnish, but that they made a representation which was calculated to mislead them as to the true state of the company. With the knowledge that losses had been sustained which rendered it improper for them to declare a dividend, it was not fair to tell the shareholders that the increased claims upon the company had so reduced the margin of profit arising from the company's operations that they could not recommend the payment of any dividend for the past year. What could the shareholders conclude from this statement but that the result of the company's operations for the past year had been not a loss but a profit, though a profit not sufficiently large to enable them to declare a dividend? It must be admitted that the accounts which were furnished by Mr. *Evans*, and laid before the meeting, afforded the shareholders no opportunity of forming a judgment upon the actual condition of the company, even if it had been possible at their general meeting to investigate these accounts, for Mr. *Evans*, in his report to the directors, tells them "that the statement of receipts and expenditure is not a correct account of profit and loss, nor does it shew the position of the company, and that it is therefore practically useless."

The shareholders were thus kept by the directors in ignorance of the affairs of the company, and this ignorance continued down to the time of the next annual general meeting on the 9th of April, 1859; to which period the question as to the validity of Mr. *Bush's* transfer of his shares more immediately refers. In the intervening time events had occurred which must be noticed as bearing upon this period. Before this next general meeting all the seven persons who were directors at the time of the former meeting in 1858, had ceased to be directors, either by actual resignation, or by disqualifying themselves by the transfer of their shares. The vacancies occasioned by the retirement of four of them had not been filled up, and at the time of the meeting in 1859 the

1873

MURRAY v. BUSH.

only acting directors were Mr. *Bush*, Dr. *Johnson*, and General *Hope*.

In this year negociations had been set on foot for a "working connexion" (the nature of which was not explained) between the company and the *Bank of Deposit*, of which Lord *Keane*, Mr. *Morrison*, and Major *Adair* were directors. An arrangement seems to have been made by which these three gentlemen were to become directors of the company and were to have shares transferred to them to qualify them to hold the office of director. Accordingly, on the 8th of April, 1859, a meeting of directors took place, at which were present the three remaining directors already mentioned, Mr. *Bush*, Dr. *Johnson*, and General *Hope*. At this meeting the directors approved of the transfer of 200 shares from General *Hope* to Mr. *Morrison*, of 100 shares from Major *Bere* to Mr. *Morrison*, and of 100 shares from Major *Bere* to Lord *Keane*, and they ordered that Lord *Keane*, Major *Adair*, Mr. *Morrison*, and Major *Bere* should be declared directors of the company, and that in favour of the first three of these gentlemen the qualification for the office of director, arising from having been the holder of shares for three calendar months, should be dispensed with. The three directors must at this time have all agreed to transfer the whole of their shares, because a transfer by each of them was executed on the following day. No reason is given why the transfer of his shares by General *Hope* should alone have been approved of, and why the transfers by Dr. *Johnson* and Mr. *Bush* were not noticed. It may be observed that the transfer by Mr. *Bush* to Mr. *Morrison* was not necessary to qualify him to become a director, as more than the number of shares to constitute a qualification had been transferred to him by General *Hope* and Major *Bere*. In his examination before the Master of the Rolls Mr. *Bush* said, "I believe the share capital would not have met its engagements, but the members of the company were rich men who would have met every engagement of the company." It is not clear as to the time to which he is referring; but when he transferred his shares he knew that there would not be one of the former directors remaining in the company, and his observation is inapplicable in terms to the new directors who were appointed the day before the execution of his deed of transfer. As to these

1873
MURRAY
v.
BUSH.

gentlemen, though they might have been in good credit at the time (of which we know nothing) they have since been all of them unable to meet the engagements of the company. It must also be observed that the transfer of General *Hope's* and Dr. *Johnson's* shares were for nominal considerations, and that Mr. *Bush's* transfer was made upon an agreement which (as already noticed) indicates his opinion of the precarious fortunes of the company.

In this state of things it cannot be denied that the shareholders were entitled to have the fact of the changes which had taken place and which were about to take place in the management of the affairs of the company fully and fairly disclosed to them. I am compelled to express my opinion that not only was this disclosure not made, but that the report to the shareholders was calculated (if not intended) to hide the truth from them. It certainly would have startled the shareholders to learn that since the last general meeting the seven directors had been reduced to three, and that those three had transferred or were about to transfer that very day all their shares, and so deprive themselves of their qualification. What must be thought of the statement in the report that General *Hope* and Dr. *Johnson* were the directors who retired by rotation, when it was known to those whose report it was (and Mr. *Bush* was one of them) that they could no longer be directors, the re-election by the meeting having proceeded upon the erroneous representation of their position in the company. The shareholders could only understand from the statement that with the four newly-elected directors the continuance in the direction of Mr. *Bush*, General *Hope*, and Dr. *Johnson* would make up the same number of seven directors as existed at the time of the annual general meeting in 1858. The re-elected directors never could, by the law of the company, act for a single day. On the 15th of April when a certificate of the approval of the transfer of Mr. *Bush's* shares is proved to have been given, the newly elected directors alone were present. Although this approval does not appear upon the minutes, yet that a certificate of such approval was signed by the directors on the 15th of April is proved by Mr. *Goold*, the former secretary to the company, who was present on that day. The fact that the approval was given after the transfer, instead of before, as prescribed by the deed of settlement, though mentioned

in the course of the argument, was very properly not insisted upon. But the validity of the transfer of Mr. *Bush's* shares was impeached on the ground that the persons who approved of the transfer were disqualified from acting as directors, and consequently that their approval was nugatory.

The approval of a transfer of shares by clause 177A of the deed of settlement is to be certified by the board of directors, and by the 59th clause no business is to be transacted by the board unless three directors are present. The objection taken to the qualification of three out of the four directors present on the 15th of April, viz. Lord *Keane*, Major *Adair*, and Mr. *Morrison*, is that they were not qualified to be appointed directors, not being at the time of their appointment shareholders of the company. By clauses 177, 177A, and 178 of the deed of settlement the following course must be pursued upon a transfer of shares. A holder of shares who has procured another person to become a shareholder in respect of his shares must give notice of the proposed transfer at the office of the company; the board of directors must certify their approbation of the proposed shareholder; the transferor must execute a deed or instrument of transfer; and by clause 185 every person approved by the board of directors, and to whom a transfer of the shares has been made, must within one calendar month after such transfer execute at the office of the company, or at such other place as the board shall reasonably require, a deed of covenant to abide by the rules and regulations of the company, "*whereupon* such person shall become a shareholder of the company." It may be worthy of remark, that the requisitions of this clause, when complied with, bring a transferee precisely within the definition of a shareholder given by the 7 & 8 Vict. c. 110 (under which Act the company was formed and registered) viz., "A person entitled to a share in a company *and* who has executed the deed of settlement or a deed referring to it." None of the three nominated directors executed any such deed, and the question is, whether without having done so any one of them had become a shareholder.

It was argued that the execution of a deed by a transferee of shares is not absolutely necessary to make him a shareholder, because it is at the pleasure of the directors whether they will require a deed or not. But this argument is incorrect. The

BIBL. LONDIN UNIV.

1873
MURRAY
v.
BUSH.

directors have no power to dispense with the deed. The 185th clause is imperative as to the execution of the deed of covenant, although the place where it is to be executed is in the discretion of the directors. The words of the clause are, "shall execute at the office of the company, or at such other place as the board shall reasonably require," the latter words being capable of reference only to the words "at such other place."

It was farther argued that the deeds of transfer executed by General *Hope* and Mr. *Morrison*, and by Dr. *Johnson* and Lord *Keane* satisfied the requisitions of the 185th clause, as they referred to the deed of settlement by the transferees agreeing to hold the shares subject to the conditions on which they were held by the transferors. This argument is disposed of at once by merely reading the clause, which expressly makes a distinction between the deed of transfer and the deed of covenant, by requiring that every person to whom a transfer has been made (that is by deed or instrument of transfer previously mentioned) shall within one month after such transfer execute a deed of covenant.

An argument in favour of the legality of the appointment of the approving directors was drawn from the time given for the transferee to execute the deed. The transfers of the shares in question were approved of on the same day that the transferees were appointed directors; and it was said, that as they might have executed the deed within the month they were qualified instanter, but subject to their future disqualification upon their non-execution of the deed within the time prescribed. But this argument is good for nothing unless it can go the length of saying that under the 185th clause the transferee becomes a shareholder immediately upon the transfer and before the execution of the deed; thereby utterly rejecting the words at the end of the clause "whereupon" (that is upon the execution of the deed of covenant) "such person shall become a shareholder."

It was farther contended that the transferees of the shares of General *Hope* and Dr. *Johnson* were precluded by their acceptance of the transfers from denying that they had become shareholders, and, therefore, that they were practically qualified to be directors. There can be no doubt that after an informal transfer of shares neither the transferor can repudiate the transaction, nor can the

transferee, in most cases, dispute his liability. But a transferee may be estopped from disputing his liability as a shareholder, and yet his ownership of the shares may not qualify him for holding an office in the company, where the deed of settlement expressly requires that the transfer upon which his qualification depends shall only be made in a certain form, which has not been pursued.

The cases of *Bargate* v. *Shortridge* (1) and *Morris* v. *Cannan* (2), which were cited in support of the argument that General *Hope* and Dr. *Johnson* were qualified as directors because they could not dispute their liability as shareholders, are very far from establishing the proposition. In *Bargate* v. *Shortridge* (1) the directors of a company who had given a consent to a transfer of shares in an irregular manner, but one which had always been adopted since the formation of the company, were not allowed, so far as they themselves were concerned, to dispute the transfer of the shares, and the consequent discharge of the transferor's liability, upon the ground of such irregularity. And in *Morris* v. *Cannan* (2) the assignees of a bankrupt attempted in vain to invalidate a transfer of the shares made by the bankrupt because he had not executed the company's deed of settlement. In each of these cases the party guilty of the irregularity or the default (for the assignees of the bankrupt stood in his shoes) endeavoured, but in vain, to take advantage of their own failure to comply with the requisites for the completion of the transfer in order to avoid it.

That transferees who have not executed the deed of covenant are not completely shareholders has been decided in two or three cases. In *Wilkinson* v. *The Anglo-Californian Gold Mining Company* (3) the Court held that a person who had subscribed for shares in a joint stock company, completely registered under the statute 7 & 8 Vict. c. 110, was not entitled to a certificate of the proprietorship of such shares as a shareholder under sect. 51 of the Act till he had executed the deed of settlement, or a deed referring thereto. *Moss* v. *The Steam Gondola Company* (4) decided, that to entitle a creditor who has obtained judgment against a joint stock company, completely registered under the 7 & 8 Vict. c. 110, to an execution against one as a shareholder under 8 & 9

(1) 5 H. L. C. 297.
(2) 4 De G. F. & J. 581.
(3) 18 Q. B. 728.
(4) 18 C. B. 180.

1873
MURRAY
v.
BUSH.

Vict. c. 16, s. 36, it must be shewn that the party against whom the application is made comes within the statutory description of a shareholder, viz., "one who has signed the deed of settlement," and that it is not sufficient to shew that he has acted as a director of the company. And in *The Galvanized Iron Company* v. *Westoby* (1) the Defendant had obtained an allotment of shares in the company, had paid a deposit, and his name was inserted in the register of shareholders, but he never executed the deed of settlement. An Act of Parliament passed for winding up the affairs of the company which empowered the directors to sue for calls, enacted that in such actions "the register should be *primâ facie* evidence of the Defendant being a shareholder, provided that such calls should be made according to the provisions of the deed of settlement, and as regarded the liability of shareholders should be deemed to have been made under such provisions"; and it was provided that "nothing in the Act contained, except as therein expressly enacted, should render liable to any calls any shareholder or other person who would not have been liable thereto if that Act had not passed." The Defendant having been sued for calls the Court of Exchequer held that the private Act applied to shareholders only, and that the Defendant was not liable as a shareholder, inasmuch as he had never executed any deed of settlement. These cases satisfy me that although Lord *Keane*, Major *Adair*, and Mr. *Morrison* were on the 8th of April what may be called incipient shareholders, they were not such shareholders as were qualified on that day to be appointed directors of the company.

Reliance in favour of the validity of their appointment is placed upon the fact that in very few instances the transferees of shares executed any deed. It is proved, that from the formation of the company to the date of the winding-up order there were eighty transfers of shares in the company, of which fifty-three were to forty-one persons not previously shareholders, and of these forty-one persons, thirty-eight did not execute any deed. It was contended that this almost universal practice sanctioned the irregularity which had occurred in the appointment of the directors in question. But sanctioned by whom? By the directors, who were

(1) 8 Ex. 17.

bound to take care in every instance that the transferee had done what was necessary to make him subject to all the liabilities of a shareholder. The directors who had approved of the transfer of the shares could not, according to the case of *Bargate* v. *Shortridge* (1), in a question between them and the transferee, deny that he was a shareholder; nor in a contest between the transferor and transferee, could they deny, the one that he had truly transferred his shares, and the other that he had become the proprietor of the shares in his stead. But where it is the interest of the other shareholders to dispute the validity of the transfer, and to insist upon the continuance of the liability of the transferor, I do not see how any former irregularities, however constant, over which they had no control, and of which they probably were not cognisant, could preclude them from the objection.

But the Respondent says that, assuming the directors were not qualified, yet having been directors *de facto*, their acts are valid by the 30th section of the 7 & 8 Vict. c. 110. But that section applies merely to the case of a person having acted as a director, and to it being afterwards discovered that he was disqualified, and it makes all acts done by him before such discovery as binding as if such person had been duly appointed or qualified. But what after-discovery has there been in this case? The directors who declared Lord *Keane*, Major *Adair*, and Mr. *Morrison*, to be directors of the company knew perfectly well that they had not the qualification required by the deed of settlement, and therefore that their acts would be void. The 30th section of the Act is therefore totally inapplicable to this case.

Supposing, however, all the objections with regard to the approval of the transfer of Mr. *Bush's* shares to be got over, the 190th clause of the deed of settlement does not discharge him from his liabilities until his transferee has executed a deed of covenant. It was argued that this deed being the act of the transferee, the transferor has no means of compelling its execution, or even knowing that it has not been executed. But surely it was his duty, as well as his interest, to inquire whether his proposed transferee had performed what was necessary in order to complete the transfer; and if he omitted to do so he must suffer the penalty of

(1) 5 H. L. C. 297.

1873
MURRAY
v.
BUSH.

his own neglect. Mr. *Bush*, as a director of the company, must have fully known what was required by the deed of settlement to render valid a transfer of his shares; and therefore he is inexcusable for not having ascertained whether the transferee had complied with these requisites, and if he found that he had not, for not enforcing his compliance with them. Whatever, therefore, may be the correct conclusion upon the former points which have been urged in this case, the purchaser of Mr. *Bush's* shares not having executed a deed of covenant to observe the covenants, agreements, and provisions contained in the deed of settlement, the condition precedent upon which Mr. *Bush's* discharge from his liability in respect of his shares depends has not been performed, and he therefore ought to be placed on the list of contributories.

I think that the Order of the Lord Chancellor should be reversed; but I believe that two of my noble and learned friends are of a different opinion, and, therefore, the result will be that it will stand unreversed.

LORD COLONSAY:—

My Lords, I have very little to say upon this case, on which I have arrived at the same conclusion as my noble and learned friend who has just spoken, nor am I to-day in a condition of health to be able to say much.

The question is, whether, between the 9th of April, 1859, and the winding-up, Mr. *Bush* was divested of his position as a shareholder in the company. It appears that the proceedings of this company were not conducted with the greatest regularity—their books even were not kept with the greatest regularity, and there were many inaccuracies with regard to their proceedings. Mr. *Bush*, who was a director of the company for a considerable time, as well as a shareholder, may have been in some degree responsible for not seeing that these matters were more carefully looked after; but with regard to the line of argument adopted at the Bar upon this appeal, I feel it a duty incumbent upon me to say that I do not think that any case was made out against Mr. *Bush* personally, of the character that was attempted to be made out against him. I do not think that there was any successful attempt made to impeach his *bona fides*, and that makes me feel the greater regret

that there were inaccuracies which, in my opinion, prevent his obtaining the relief which he seeks. I think the inaccuracies were just those which have been pointed out by my noble and learned friend, and I shall only indicate them as being the basis of what I offer as my opinion.

It appears that on the 9th of April, 1859, Mr. *Bush* transferred all his shares to Mr. *Morrison* for £2000, to be paid in the month of April, 1861, contingently. The agreement for the sale of his shares is a very peculiar one, but it does not lead me to retract in any degree what I have said. Then, on the 11th of April, 1859, there was a return of the transfer to the Registrar of Joint Stock Companies. Now the objections are these. In the first place, the transfer was not approved of by competent directors because the persons appointed on the 8th of April were not then shareholders, and therefore were not in a position to be directors of the company. I agree with my noble and learned friend who has just spoken, as to the effect of those elections. I think those persons were not properly shareholders, and therefore they were not capable of giving a valid confirmation to and approval of the transfer. The second objection is that the transferee, Mr. *Morrison*, had never signed the deed. That also, in my opinion, forms a valid ground of objection. These, my Lords, are the two grounds upon which I think that Mr. *Bush* could not get himself effectually relieved. I wish it had been otherwise.

LORD CAIRNS:—

My Lords, it appears that in the winding-up of this company the name of *Peter Morrison* was, in the first instance, placed upon the list of contributories as proprietor of the 400 shares which have been mentioned by my noble and learned friend. A summons was subsequently taken out by the executors of Mr. *Houldsworth*, who, as representing their testator, had been placed upon the list of contributories, and that summons required the Respondent, Mr. *Bush*, to shew cause why his name should not be settled upon the list of contributories in respect of these 400 shares, and the name of *Peter Morrison* removed.

That, my Lords, is the foundation of the proceedings which now come before your Lordships; and I own, I never have seen a case

1873
MURRAY
v.
BUSH.

which more strongly, to my mind, proved the great advantage of some form of allegation and of pleading in a litigation between adverse parties. Your Lordships have now before you a thick volume, containing several hundred pages, and you are left to discover from that volume, and from the arguments of counsel at your Lordships' Bar, from a mass of affidavits, from some parol testimony, and from a number of documents, what the case is which is alleged, what the ground is why this list of contributories should be altered by one name which has been placed upon it being taken off, and another substituted. And I may say in passing, as if the matter were not difficult enough in itself, the difficulty and confusion in this case have been increased, and, I am sorry to say, the expense increased also, by the circumstance that the Appellants have printed at length a very voluminous appendix, and the Respondent has printed at length the same appendix, and the Respondent has even gone beyond that, for he has added a shorthand writer's note of the argument of counsel in the Court below, and, farther, a somewhat long and argumentative affidavit, filed entirely irregularly, to prove whose fault it was that there was a double appendix in place of a single one. My Lords, anything more irregular or burdensome as regards costs and the consumption of time than this case is, starting at first with what I have referred to, namely, the absence of any pleading or allegation, and that difficulty added to by the lavish mode in which the parties have proceeded with regard to expense, I have never seen.

Well, my Lords, we have, as I have said, to discover from this mass of documents, aided by the argument of counsel at your Lordships' Bar, which I remember was extremely able, what is the case which is alleged as the foundation of these proceedings? It is said that the transfer of the 400 shares in question from Mr. *Bush* to Mr. *Morrison* was invalid by reason of informality. I shall reserve for the last of the observations I have to make that ground of attack on the transfer. The second reason alleged is this: the 191st clause of the deed of settlement of this company provided: "That if ever the losses of the company shall have absorbed not only the whole of the fund called the Reserve Fund, but also 80 per cent. on the gross amount of the capital subscribed for, the said company shall be *ipso facto* dissolved, and the board of directors for

the time being shall within twenty days, or as soon after such losses being incurred as the said board possibly can, and they are hereby required to call a special general meeting of the shareholders in such manner as hereinbefore mentioned, and lay a statement of the affairs of the company before such meeting." It is said that before the month of April, 1858, when Mr. *Evans* made his report, this contingency contemplated by the 191st clause had occurred, that more than 80 per cent. of the capital had been lost, and, that, therefore, the clause had become operative. My Lords, if the clause became operative, that which had taken place was the *ipso facto* dissolution of the company, and if the company was *ipso facto* dissolved I may say that the consequence would have been, not that a question would have arisen as to the transfer of shares as between *Bush* and *Morrison*, but the consequence would have been that all transfers afterwards made would have been invalid, and the shares of all persons would have become incapable of transfer, and the company would have become incapable of undertaking any new business or entering into any new contract, whereas, in point of fact, we know that it carried on business for some years subsequently, and that transfers of many other shares were made. If the clause therefore had become applicable, if the contingency mentioned in it had occurred, it would have been a ground not for removing the name of *Morrison* and substituting the name of *Bush* upon this register, but it would have been a ground for a proceeding of a wholly different kind, a proceeding challenging everything as absolutely inept and invalid which had been done by the company from the time that the *ipso facto* dissolution had taken place.

But I am bound farther to say that it appears to me that the proof that the contingency contemplated by the 191st section had occurred, has entirely failed. I have looked at the report of Mr. *Evans*, and it appears to me that this observation is to be made upon that report; which, indeed, Mr. *Evans* himself made in the document which accompanied it—he has taken an account of the capital of the company, and of the debts and the liabilities, but he has not, as he himself states, made any allowance for the value of the goodwill of the company as a going concern. The company was an extremely peculiar one. Of the insurances and risks we

1873
MURRAY
v.
BUSH.

are only now told the particulars. There was coming in year after year a body of premiums varying from £30,000 to £40,000, a connection, a goodwill, a public favour had been created by the company, rightly or wrongly, by means of its business as conducted up to that time, and by means of the advertisements to which it had resorted; and whether that goodwill should be estimated, as it is stated to have been estimated by a valuator, as of the value of three years of these annual premiums, or at a smaller or at a larger sum, I need not stop to inquire. It is abundantly evident that the goodwill of the concern as a going concern was worth some substantial sum, and that sum is altogether omitted, as indeed Mr. *Evans* states, from his calculations. Whether if a proper sum had been allowed in respect of goodwill it would have shewn that the capital had been reduced anything like 80 per cent, your Lordships cannot, I think, speculate. It is sufficient to say that there is no proof upon the subject, and therefore those upon whom the onus of proof lay to shew that the contingency mentioned in the 191st section had occurred, have entirely failed, as it seems to me, to sustain that onus.

Then, my Lords, I pass to the next head of challenge of the transfer of these shares, which, in point of fact, occupied the greatest portion of the argument at your Lordships' Bar. I am obliged to look at the case of the Appellants for a statement of what this head of challenge is to be taken to mean, and I find at the commencement of the case, on the first page, "the Appellants contend that the transfer was informal and invalid, and was part of a scheme by which the Respondent *Bush* and the only other two directors of the company were enabled to leave the company without exciting the suspicion of the shareholders, and without informing them of what the directors knew to be the fact, namely, that the company's capital was insufficient to meet its engagements, and that the company was in such a position that, according to the provisions of its deed of settlement, it ought to be wound up." And farther on, at page 15 of the case, there commences a narrative of the proceedings of the directors from the month of April, 1858, when Mr. *Evans's* report was made. It states the resignation of Mr. *Fitzpatrick*, who was the first of the directors who resigned, and transferred his shares in the month

of April, 1858—it states the resignation and transfer of the shares of Mr. *Smith* and of Mr. *Tyler*, and then it continues: "In this way three out of the seven persons who were directors at the time *Evans's* report was made quietly got rid of their shares, and *Hope, Johnson, Western,* and *Bush* were left the only directors of the company." And the first of the reasons for the appeal is stated thus: "Because it was the duty of the Respondent *Bush,* and of the other directors of the company, after receiving *Evans's* report, and the balance sheet accompanying the same, to lay such balance sheet, or some other true statement of the affairs of the company before the shareholders, and instead of doing this the said Respondent and the other directors of the company concealed the true state of the company's affairs, and improperly prolonged the existence of the company, and thereby were enabled to transfer, or affect to transfer, all their shares therein."

Now I understand this to be an allegation (a very grave, and a very important one) to this effect; that a fraudulent scheme was originated and planned among the directors, having its origin at the time of the making of *Evans's* report in the month of April, 1858—a scheme to keep back from the shareholders of the company a knowledge of the true state of its affairs, and to keep back that knowledge for this purpose, namely, in order that the directors themselves, who held a large number of shares in the company, might have time and opportunity given to them to get rid of their shares, to leave the company, and to put other persons in their place to bear the responsibility which otherwise would have been theirs. My Lords, I wish to state my opinion with regard to that part of the case at the outset, because I think it extremely important that, so far as my opinion goes at least, I should place upon record the view I take of it. Even if the whole of this grave allegation had been true, and true to the letter, it appears to me to state and allege a case which is not a case for a proceeding of settling contributories under the *Winding-up Act,* but is a case for relief of a wholly different description. It is a case which, if proved to be true, and to be one which would entitle the person alleging it to any relief at all, the relief would be in the nature of a proceeding by a bill in Chancery to make those persons who had carried on the company, who had added to its liabilities, who had

1873
MURRAY
v.
BUSH.

fraudulently concealed its affairs from the shareholders for the purpose of effecting their own end, answerable for the loss which had been incurred in carrying on the company, and to make them subject to an indemnity in favour of those who had sustained this loss. It appears to me to be a case wholly foreign to the purpose of a proceeding for settling contributories under the *Winding-up Act*, where it appears to me that the question to be discussed and decided is whether a particular person was or was not at a particular time, or is or is not at the present time, a shareholder in the company.

But passing from that, which would be an observation with regard to the form of relief, I come to that which is of more importance, the substance of this allegation. Your Lordships do not sit here as judges upon questions of morals, or of manners. If you did, I would take leave to say that for my part I entirely disapprove of much that I observe in the conduct of the affairs of this company by the directors. I disapprove of the manner in which the accounts and the books were kept. I disapprove of the want of frank communication, to the shareholders by the directors, of the state of the company, and of the neglect of the observations, be they well-founded or ill-founded, which had been made in regard to the affairs of the company, by the person they consulted, namely, Mr. *Evans*. I disapprove of the arrangements which were subsequently made for the purpose of entering into what was termed a working agreement with the *Bank of Deposit*, without there having been a fuller statement to the company of the object of that arrangement. But the question, and, as it appears to me, the only question which your Lordships have to decide for the purpose of this appeal is this—were these things (treat them as censurable if you please) done by the directors for this fraudulent and evil end—to keep the company in the dark as to the state of its affairs until they, the directors, should have transferred, and in order that they, the directors, might transfer, their shares, and get rid of their own liability? Unless the case can be brought up to that which I have stated, all the other observations with regard to the conduct of the directors appear to me to be for the purpose of this litigation wholly immaterial.

Now, my Lords, I have no hesitation in saying that I cannot

arrive at the conclusion that any of these things were done by the directors for the fraudulent purpose to which I have referred. I am glad that in arriving at that conclusion I have the concurrence in opinion of the Master of the Rolls, before whom the case first came, of my noble and learned friend, the late Lord Chancellor, and of, I think, my noble and learned friend who last addressed your Lordships, and even although my noble and learned friend who now sits upon the Woolsack referred in some detail to the conduct of the directors, I do not know that he made it the *ratio decidendi* of the opinion which he offered to your Lordships.

But now, without going through the history of the events of the year 1858 in more detail, I will state in a very few words the reasons which lead my mind, without any hesitation, to the conclusion that there was in this case no fraudulent object of the directors or of Mr. *Bush* with regard to the transfer of the shares. In the first place as to the retirement of the Respondent and of the other directors, it appears to me to be proved beyond all doubt that the board of directors of this company was not a harmonious body. There were differences of opinion amongst them, and it was those differences of opinion themselves which led to the reference to Mr. *Evans* to examine the affairs of the company. The differences were not healed by Mr. *Evans's* report. Mr. *Fitzpatrick*, who had been one of those who had taken the strongest part against the majority of the directors, resigned. But the differences continued: It is perfectly apparent that after the first three directors resigned, owing to those differences, the resignation of the other directors was brought about, not at all with reference to the disposal of their shares, but in order that the body which is termed in these proceedings the *Bank of Deposit*, which was anxious to obtain a control over the working of this insurance company, and to enter into some arrangement with them, might substitute persons in its interest upon the board of directors of the insurance company. With regard, again, to Mr. *Evans's* report, I would observe that there was nothing whatever about that report which disclosed to the directors, or to any of them, anything that they did not perfectly well know before. They were no more informed of the state of the company after that report than they were before. The report was for this purpose of the simplest kind. The books

1873
MURRAY
v.
BUSH.

of the company for this purpose conveyed to the minds of any one having access to them all that the report itself shewed, and I cannot accept the statement that it was *Evans's* report which put the directors in motion to leave the company and transfer their shares.

But there are three circumstances, my Lords, which, more conclusively than any general observations which I could make, satisfy my mind that there was no fraudulent purpose on the part of the Respondent. In the first place if there was this scheme—originating in the report of *Evans*, made at the commencement of April, 1858—this scheme to get out of the company, to get rid of the shares of the directors, to get rid of the shares of *Bush*, how is it to be accounted for that from the beginning of the month of April, 1858, up to the beginning of the month of April, 1859, no one single step was ever taken by *Bush*, which can be pointed out, to get rid of or transfer any of those shares? For the space of a whole year after making of this report, which is said to have terrified the directors and to have made them anxious, hurriedly anxious, to get rid of their shares, whatever the other directors may have done, the Respondent certainly appears for a whole year to have been perfectly quiescent, and to have taken no step whatever to get rid of a single share in the company.

But, my Lords, the matter does not rest there, because you do find this piece of evidence which, so far as I can see, is entirely unchallenged in these papers, and it is supported by the testimony of two trustworthy witnesses, namely, *Bush* and the manager, as he is termed, of the company, *Goold*. The precise date is not given, but some time before April, 1859, a direct offer was made to *Bush* to buy his shares from him. He had not solicited the offer; he had not placed his shares in the hands of any one for disposal. On the contrary, he states that when the offer was made to him he treated it as a jest, so little was he disposed to entertain it. The offer was this, the shares were £5 shares, and he was offered a price of 30*s.* a share upon the 400 shares, which would have made £600. He was offered that sum in immediate payment if he would consent to dispose of his shares. My Lords, he refused the offer, he did not, it would appear, enter into any negotiation for a larger sum, but distinctly refused the offer that was made to

him. It appears to me that the full weight of that refusal cannot be properly estimated unless your Lordships couple with it another circumstance. Not a very long time after this refusal had been made these shares were disposed of by *Bush* to *Morrison*. My noble and learned friend who first addressed your Lordships referred to the agreement under which they were disposed of. That agreement stipulated that £2000, which is, I think, the par value of the shares, should be paid for them, but that it should not be paid at once, nor until after a lapse of, I think, two years or thereabouts, and that it should not be paid at all unless a certain profit or dividend had not been made by the company, or in case the company should be wound up under the *Winding-up Act*. Taking these two circumstances together, nothing to my mind is more satisfactorily proved than this, that at this time *Bush* entertained a hopeful prospect with regard to the company, he refused that which was clearly a substantial offer of a sum of money, £600 in cash, and he preferred to wait for the chance of getting the whole value of his shares, although the chance of getting that whole value was accompanied by the correlative risk of losing every shilling upon the shares. I do not think that anything could more clearly indicate a reasonable expectation entertained by Mr. *Bush* that the company would yet be righted, and that the shares were of considerable value in the market.

Well but, my Lords, this is not all. I have relied upon the circumstance that for a year the Respondent *Bush* was entirely quiescent as to any attempt to get rid of his shares. I have relied upon the circumstance that when offered a considerable sum for his shares he refused it, and preferred to take the chance of getting a larger amount, even although it might be accompanied by the risk of losing the whole. But now there is this farther circumstance in the case—if it is true that the whole that was done during the years 1858 and 1859 was a fraudulent scheme concocted by the directors—if it is true that the company was kept in the dark upon the subject, in order that the directors might transfer their shares and get out of the company—if it is true that the directors, or some of them, left the company in a sudden and surreptitious way, in order that their going might not excite the alarm of the shareholders—if it is true that the whole of the directors did get rid of

1873
MURRAY
v.
BUSH,

their shares in a manner which the shareholders of the company, if they had known of it, could not have approved of, would have challenged, would have deprecated, and would have found fault with,—then, my Lords, I ask the question how it comes to pass that in the year 1860, a year after all this had taken place, when the whole was known, when it was proclaimed upon every document of the company that the whole of the board of directors had been changed and that a new board had been appointed, when the return of the transfers of shares in the company to the proper office had made it clear that every share of the old board of directors had been transferred, I ask how it came to pass when the shareholders came together in public meeting, as in fact they did in the month of September, 1860, and all this was known to the shareholders, that not a single shareholder rose at that meeting, challenged what had been done, complained of what had been done, and stated that the whole had been done in the dark and without the knowledge of the company, and that the company had been aggrieved by the conduct both of those directors who had gone out and of those directors who had come in?

My Lords, we are dealing with these matters after the lapse of a number of years, but here are witnesses of the proceedings on the day when they took place. If there was anything wrong they must have known it. The company certainly, in 1860, was not in a flourishing condition. There was everything to excite the suspicion and distrust of those who were receiving no dividend upon their shares; but, in place of finding that any complaint was made, we find that the expressions of the meeting were entirely of an opposite character. Your Lordships will observe that the report which was made by the new board of directors, and the proceedings of the meeting which followed the making of that report, was given to us at page 177 and the following pages of the Second Appendix, and anything more open than the character of that report I have never read. In place of endeavouring to conceal the change which had taken place in the constitution of the company, the new directors began by saying that that was the very "first occasion on which the present board have had to give an account of their stewardship, having only been appointed at the last general annual meeting of shareholders, held in 1859."

They add that they had not called the meeting earlier, because they "were anxious to ascertain thoroughly the position of the company, and to make themselves perfectly acquainted with the nature of its business before meeting the proprietary." They go on to say: "Your directors observe that their predecessors" (that is a wholly different board) "appear to have spared no pains to render the system adopted accessible to the general body of farmers." They go on to add, "they do not quite coincide with the anticipations expressed by your former board that the ratio of mortality will lessen to any material extent." This report was made by the directors to the shareholders, and I find that the following resolutions were put to the meeting and carried unanimously: First, "that The Right Honourable Lord *Keane* and Major *James Adair*" (who are persons implicated, if the allegations be true, in the gross fraud practised upon the shareholders—two of those directors who were implicated, I mean, as coming in in the place of those going out) "be and they are hereby re-elected directors of the company, and that the appointment of Mr. *R. W. Goold* be confirmed." "That in accordance with the 120th clause of the company's deed of settlement to that effect, the directors be and they are hereby authorized and requested to call up the remaining portion of the capital." "That the thanks of the shareholders be tendered to the directors for their efforts during the past year. That the thanks of the shareholders be given to the manager for his untiring exertions in the company's interests."

Now I can quite understand that the Appellants in this case, the executors of Mr. *Houldsworth*, whose testator had before this time left the company under arrangements which were the subject of discussion in another case that came before your Lordships' House, whose testator was taking no part in the affairs of the company, I can quite understand that those executors afterwards discovering what appears to them to bear the character of a fraud should investigate it, and should make upon it such observations as occurred to them, as strangers, as being proper observations to be made. But it is perfectly clear that those who were shareholders, taking a part in the business of the company at the time, knew everything that had been done in the year 1859, and were perfectly satisfied with everything that had been done. They

1873
MURRAY
v.
BUSH.

were satisfied that the old board of directors had gone out and that the new board of directors had come in, and they were satisfied with the changes in the proprietorship of shares which had accompanied this change in the directorate, because these changes were all before them at that time.

I have gone into this matter at greater length perhaps than was necessary for two reasons, first, on account of the mode in which the case has been mixed up and embarrassed with references to these questions of conduct, and also because, there being grave allegations on the subject of conduct, I thought it was incumbent upon me to state to your Lordships the conclusions at which I have myself arrived upon that which affects the personal character of those who are engaged in this litigation.

Therefore, my Lords, I arrive at the conclusion that, upon the first ground, namely, the loss of capital to the extent of 80 per cent. there is no reason to differ from the decision at which my noble and learned friend, the late Lord Chancellor, arrived in the Court below. So also upon the question of alleged fraud, there is, in my opinion, every reason to concur in that decision, and in the conclusion at which he arrived.

That brings me to the third and last question in the case, which is a much more appropriate question, as it seems to me, to be discussed in a proceeding for settling contributories, namely, the question whether the 400 shares, which have been referred to, were validly transferred from *Bush* to *Morrison*, and whether it is *Morrison* or *Bush* who should stand upon the list of contributories as the shareholder and contributory in respect of those 400 shares. The shares undoubtedly were the shares of *Bush*. Undoubtedly, the name of *Morrison* was returned before the winding-up of the company, and returned more than once, to the proper office, the office of the Registrar of Joint Stock Companies, as the shareholder, under a transfer made from *Bush* to *Morrison*. But the question is, Was the transfer a valid and formal one? Now, before referring to a few of the sentences in the deed of settlement of the company which are material, I will ask your Lordships to bear in mind what is the scheme under which shares were made transferable in this company. There are three, and, as it appears to me, only three rules, formalities, regulations (call them what

you please) to be observed in order to effect a valid transfer of a share in the company, and I think your Lordships will find it extremely convenient to bear these three requisites of a transfer clearly in mind. The first is, that the outgoing shareholder must enter into an agreement with some other person whom I will term the incoming shareholder, that the incoming shareholder shall take the place of the outgoing shareholder. There must be an agreement of that sort as between the outgoing shareholder and another person; that is the first requisite. The second requisite is that the transferee, as I will term him, must be approved of by the directors of the company acting for the company. And the third requisite is, that the transferee must put himself into direct relations of contract with the company. He must come to the company and agree with it that he will observe the rules and regulations of the company comprised in their deed of settlement. My Lords, these are the three requisites of a transfer of shares. If those requisites are complied with the transfer is good; if they are not complied with the transfer is invalid.

Now, my Lords, let us apply the statement of these requisites to the present case. The clauses of the deed which are referred to as material are the 185th, 186th, and the 190th, and I will ask your Lordships to be so good as to bear in mind what appears to me to be most material with regard to each of these clauses, namely, that they are affirmative clauses, and not negative clauses. When a person shall, by transfer, have become a shareholder of the company, the 185th clause provides, "That every person who shall be approved of by the board of directors as a holder of any share or shares in the company, and to whom a transfer of such share or shares shall have been made, and who shall not then be a shareholder of the company, shall, within one calendar month after such transfer, execute at the office of the company, or at such other place as the said board shall reasonably require, either in person or by attorney, a deed of covenant to abide by the rules and regulations of the company, whereupon such person shall become a shareholder of the company." That is an affirmative provision. The 186th provides for the preparation of the deed, and the 190th, which I must read at length, says: "That when and so often as any person or persons not a purchaser or purchasers

1873
MURRAY
v.
BUSH.

from the board of directors shall, in the manner hereinbefore required, become a holder of any share or shares in the company, and shall have executed a deed of covenant to observe the covenants, agreements, and provisions contained in these presents, the last holder or owner of such share or shares, and all persons claiming through or under him or her other than the new shareholder or shareholders shall from the time of such new shareholders or shareholders becoming such, and on payment of such moneys," and so on, be "for ever acquitted and discharged from all farther claims, demands, and liabilities in respect of such share or shares, and the certificate to be given by the directors, as hereinbefore mentioned, of such last shareholder having ceased to be a shareholder in respect of such share or shares shall be conclusive evidence of such acquittance and discharge in respect thereof." That is again an affirmative clause, stating at what time the old shareholder shall be acquitted of all liability.

Now what are the points in respect of which it is alleged that as a matter of formality the transfer of shares in this case was invalid? The first is that referred to by my noble and learned friend, which was very much argued at your Lordships' Bar, that there was not any proper approval of *Morrison* as a new shareholder and of the transfer from *Bush* to *Morrison*. Of course your Lordships are well aware of the object for which an approval of a board of directors of this kind is to be given. The object is that a shareholder may not be able to substitute for his own liability that of some person who may be an insolvent, or may, at all events, not be sufficiently solvent to answer the demands which may be made against him. Of that question the board of directors is constituted the judge, to decide it on behalf of and for the benefit of the company at large. In the case before your Lordships the approval was given, or rather professed to be given, at a board of directors. At that board, which was held on the 15th of April, 1859, there were present four directors. It is said that three of them—Lord *Keane*, Major *Adair*, and Mr. *Morrison*—were not *de jure* directors. They had agreed to take shares in the company; but it is said that they had not executed a deed binding themselves to obey the regulations of the company; that therefore they were not shareholders in the proper acceptation of the term; that

not being shareholders, they could not be directors, and that the approval, therefore, given by that board of four persons was not the approval of four directors, for three of them were not qualified to be directors.

My Lords, I will say nothing at this present moment with regard to the necessity of executing a deed to constitute a person a shareholder. I will assume that in favour of the objectors, on the ground that I have stated. Still it appears to me that this is an objection which cannot prevail. In the first place, in my opinion, it is an objection that, if it has any foundation, would be entirely cured by the 30th section of the *Joint Stock Companies Act*, 7 & 8 Vict. c. 110. That section provides: "That, notwithstanding it may be afterwards discovered that there was some defect or error in the appointment of any person acting, or who may have acted as a director of a joint stock company registered under this Act, or that such person was disqualified; yet all acts done by him as such director before the discovery of such defect or error, either solely or with other directors, shall be as binding on him and on the company, and the directors and officers thereof, as if such person had been duly appointed or qualified, and if such acts were done *bonâ fide*, shall be as binding on all persons whomsoever as if such person had been duly appointed or qualified."

It was contended here that this section could not apply because there was no subsequent discovery that there was any defect or error in the appointment. My Lords, what are the facts of the case? We find that in the history of this company transfers amounting to something about eighty in number have been made from time to time of its shares to, I think, forty-one different persons. We find that out of those transfers, in every case except three, it had not been considered requisite to comply with this section of the deed of settlement of the company, that is to say that in thirty-eight cases out of the forty-one no deed had been executed or had been thought necessary to be executed. I do not stop to consider whether that was right or wrong, whether the directors would have power to dispense with the clause or not. I do not consider that at present, but I take the fact to be as stated that rightly or wrongly, carelessly or otherwise, this had grown up to be the prac-

1873
MURRAY
v.
BUSH.

tice of the company (I mean the practice of the executive of the company, the directors) that the execution of a deed by the incoming shareholders had not been thought necessary, but they had rested satisfied with his execution of the transfer. Let it be supposed that that was irregular, that it was a mistake to imagine that the directors could dispense with that provision in the deed of settlement. My Lords, it appears to me that that is exactly one of those errors which are contemplated by the 30th section of the statute. It is one of those errors growing up from the practice of the company being itself erroneous which is repeated from time to time, and which, if not cured, will invalidate for mere error the proceedings of the company.

Therefore, it is exactly one of those errors which is to be cured by this 30th section, which provides that notwithstanding that it may be afterwards discovered that there was some defect or error in the appointment of the directors, any acts of those directors shall be valid. I apprehend if an error of that kind has been discovered, if it turns out upon legal investigation that that practice was erroneous, it was one of those things which this section would cure. Observe what would be the consequence if your Lordships did not hold that to be the meaning of the section. It would not affect merely the transfer of these shares, but every act of these directors —that is to say, of these same gentlemen—must have been equally invalid. If this be a proper argument, everything which they did in the year 1859, in the year 1860, and in the year 1861 (for I do not find that they ever executed the deed subsequently) was invalid, and unless it is cured by the 30th section it has not been and cannot be cured at all. I think that would be a startling result if your Lordships were to adopt such an interpretation of the clause.

But I do not stop there, because it appears to me that, independently of this clause, the objection is one which cannot prevail, and for this reason, your Lordships have probably observed (I mentioned it incidentally before) that not only was there a return made to the Registrar of Joint Stock Companies about the date of which I am speaking, viz., April, 1859, immediately after this transfer of shares was made, as to which return there might be the same question, because it was signed by directors upon whose title, perhaps,

the same observation might be made; but over and above that, the company having been reconstituted, having gone on carrying on business for a considerable time, having in the meantime registered the transfer of other shares, this same company, through its directors and through its executive, in the beginning of the year 1860, returned to the Registrar of Joint Stock Companies a fresh return of all the past transfers of shares, and included in that return to the registrar the transfer of the shares from *Bush* to *Morrison*, stating the number in gross, stating the numbers of the particular shares, and stating the date of the transfer.

Now, my Lords, let us bear in mind what is the object for which a board of directors is authorized to approve of a transfer of shares. It is to secure the company against an improper or an insolvent shareholder being substituted for a solvent one. But could it be tolerated that anybody connected with a company carrying on business in the course of which a transfer of shares had been made, say in the month of April, 1859, which had, I will not say, been approved of by a properly constituted board of directors at that time—I will assume that it had not—but had been returned by the company through its executive one year afterwards to the proper officer to receive such transfer returns, as a transfer which the company was content to approve of, could anybody, I say, connected with that company afterwards be allowed to turn round and say, "This Mr. *Morrison*, who was thus returned a year after the transfer was made, as a shareholder of the company, never was approved of by any board of directors, and is not a shareholder in the company because he has not received the approval of the directors?" Anything more contrary to common sense than a conclusion of that kind could, I venture to say, hardly well be conceived.

But, again, it does not rest there, because, I ask your Lordships farther to observe this: To whom were those shares transferred? To *Morrison*. Who was *Morrison?* He was presented to the shareholders of the company as their new director. The company at a public meeting received him as their new director. He could not have been their director unless he was a shareholder. In approving him as their director they approved him *à multo fortiori* as a shareholder. Really, when the matter is thoroughly under-

1873
MURRAY
v.
BUSH.

stood, it comes to be not a question at all of the board of directors approving of *Morrison* as a shareholder in the company, but of the company at large approving of him. And they approved of him twice over, in 1859, and in 1860, as a director of the company, at the time when he was sitting as a director of the company under the qualification of the shares transferred to him in April, 1859. My Lords, so far as the approval of the board of directors is an essential for a valid transfer of shares I maintain that there was here an approval by the directors, and that there was here much more than an approval by the directors, there was an approval by the company at large.

My Lords, passing from that I come to the next and only other ground on which the transfer is impeached. It is said that Mr. *Morrison* never executed that deed which is mentioned in the 185th section—the deed of covenant to abide by the rules and regulations of the company. Now here again I would ask your Lordships to consider what the object and end of this rule was. It appears to me to be a very excellent rule, and to have a very excellent object. In a transfer of shares, as between the transferor and the transferee, the transferee always agrees to accept the shares and to hold them upon the same terms as the transferor held them. As between the transferor and the transferee, therefore, the execution of the mere transfer is an engagement by the transferee that he will stand in the shoes of the transferor, and by virtue of that transfer the transferee can always be bound, as between him and the transferor, to indemnify him against any demand the company may make. But the company requires something more. The company requires that the transferee should come forward to it, should put himself in direct relation and contact with it, and should agree with it, and not with a third party, to abide by the rules of the company, and to acknowledge himself to be a shareholder in the company. That I take to be the object of the 185th section, and that, I think, disposes of the argument that the execution of the deed of transfer alone would be sufficient. I do not think it would.

Now let us look at the substance of this transaction. If the transferee in this case had been one of the general public and a stranger to the company, it is quite clear that until he came

forward to the company and acknowledged himself a shareholder the company would have had no control over him as such. But who was the transferee here? The transferee was *Morrison*. But who was *Morrison?* *Morrison* immediately upon receiving a transfer of these shares, and of the other shares, of which he became a proprietor, was elected a director of the company. He became a director of the company, and he acted as a director of the company from that time until the time when the company was wound up. And not only that, but *Morrison*, as one of the directors of the company (for the act was the act of the whole), returned to the Registrar of Joint Stock Companies immediately after the transfer of the shares, and returned again in the beginning of the year 1860, himself as the proprietor of these 400 shares.

Supposing Mr. *Morrison* had turned out to be a rich man, and supposing Mr. *Bush* had turned out to be an insolvent man when the company came to be wound up, I ask the question, Would Mr. *Morrison* have been heard, in any Court of Equity in the country, to say that he was not the owner and proprietor of these 400 shares? Could he even have said this, "Whether I am the proprietor or not is a matter between me and *Bush; Bush* must be put upon the list, he may have some claim over against me for an indemnity?" I say that he could not. I say that the moment that he assumed the directorship of the company, and returned himself to the Registrar of Joint Stock Companies as the proprietor, by transfer, of these 400 shares, he became, to all intents and purposes, as much as if he had executed 100 deeds one after the other, the owner of these shares, as between himself and the company, and the person directly responsible to the company to abide, in respect of those 400 shares, by the rules and regulations of the company laid down in their deed. And, my Lords, with great submission to those who think otherwise, I say that it is adhering to the letter and misapprehending the spirit of this affirmative rule if you read this rule as if it were couched in negative terms, and as saying no other adhesion, however formal or solemn, to the rules and regulations of the company, shall be sufficient unless the form is gone through of putting your wax to a deed prepared in a particular way.

1873
MURRAY
v.
BUSH.

It has happened, we are told, that Mr. *Morrison* cannot be forced to make good sums which ought to be forthcoming. I assume, by this appeal, that it is thought that the result of proceedings against the Respondent may be very different. But, my Lords, we are not to decide the question by that event. It appears that Mr. *Morrison*, at the time he was received into the company, was considered a person whose adhesion to the company was thought desirable and advantageous. In my opinion he became a shareholder of the company and the proprietor of these 400 shares, and, in my opinion, in him, and in the transfer to him, were fulfilled and realized every one of the three requisites of a valid transfer to which I have referred. He had assented, as between himself and *Bush*, to take the shares. He was approved of, as I stated to your Lordships, not merely by the directorate of the company, but by the company itself. He had come to the company, and, as its director, had solemnly engaged himself by the acts, to which he was a party, to be the proprietor, and to stand as the proprietor of these 400 shares, and so comply with all the rules and regulations of the company with regard to them. My Lords, in my opinion the transfer was valid, and the objections made to it do not prevail.

I will only add that I have looked into this case, and considered the law applicable to it, with very great anxiety, and that for this reason, there have been several cases decided with regard to this company, some of which have come to your Lordships' House. In some of these cases persons who thought that they had been entirely acquitted of all demands of this company have found that they were labouring under a mistake, and, contrary to their expectation, after a great lapse of time have been placed on the list as contributories to the company, and, I believe, the present Appellants, the executors of Mr. *Houldsworth*, are persons who are in that position. I own that it has been to my mind a matter of great anxiety lest, possibly, the conclusion at which your Lordships might arrive in this case should appear to those persons present, to deal out to the Respondent in this case a less severe and exact measure of justice than was dealt out to those other persons, in the cases to which I have referred. But I desire to point out, and I think it can be done most distinctly, the clear

difference between this case and those others which I have mentioned. In those cases persons who were shareholders in the company endeavoured, perfectly, honestly, and fairly, to extricate themselves from the company by arrangements which in no way were authorized by the deed of settlement, and the directors of the company proposed to release them from the engagement of the company not by an attempt at compliance with the forms of the deed of settlement, but by arrangements which in no shape or sense were authorized by the deed of settlement; and the question in all those cases really was this, not whether the deed of settlement was complied with, for no one ever pretended that it had been, and no one ever pretended that, had those matters been challenged soon after they occurred, it would have been possible to defend them, but the question in those cases was, whether there had not been such a lapse of time, whether there had not been such a knowledge on the part of the company, and such a condonation of the irregularities in the transfers which had taken place, as would of themselves prevent the persons who thought they had left the company being restored as contributories to its engagements.

The case here is altogether different. It is perfectly clear that in this case every one intended that the transfer should take place in a way that would release Mr. *Bush* from his shares and put Mr. *Morrison* on as a proprietor. It is perfectly clear that every one intended to proceed exactly in accordance with what they thought were the exigencies of the deed of settlement. My Lords, if even, notwithstanding that intention on their part, I had found that in any point of substance they had failed to observe those requisites upon which alone a transfer of shares could take place, I should have been obliged, even in this case, to hold that the attempted transfer was invalid, and that the transferor should remain liable in respect of his shares. But, for the reasons which I have attempted to explain, I have arrived at the conclusion that the formalities were in every substantial way complied with upon the occasion of the transfer; and, therefore, my Lords, I should humbly advise your Lordships that the appeal which is now before us should not succeed, but that the judgment of the Court below should be affirmed.

1873

MURRAY v. BUSH.

LORD HATHERLEY:—

My Lords, I shall state extremely briefly my reasons for adhering to the opinion which I formerly expressed in the Court of Chancery upon the case which is now before your Lordships for consideration. I have, it is scarcely necessary to say, most anxiously re-perused and reconsidered the opinion which I then delivered, and I have had an opportunity of so doing with the assistance of my noble and learned friend who is now sitting on the woolsack; for he kindly communicated to me his opinion on the subject; and finding that there was a difference of opinion between himself and myself, I felt the more doubtful and hesitating as to whether or not I had arrived at a correct conclusion. But after having had the advantage of knowing, and now of hearing fully delivered the opinions of that noble Lord, I have not been able to satisfy myself that I in any way erred in the first instance; and I have certainly been greatly confirmed and strengthened in my view by the opinion which has been expressed by the noble and learned Lord who last addressed your Lordships, whose opinion has been so fully and clearly stated as to render it scarcely necessary for me to add another word on the subject.

I do, however, feel desirous of saying that I have with special anxiety considered the question of the *bona fides* of the transaction; because, although I fully agree and sympathise with my noble and learned friend who spoke last as to the extreme inconvenience of having questions of fraud and misconduct on the part of those who had the management of a company introduced in this singularly irregular and ineffective mode, namely upon an application to substitute one name for another on the register, yet I must say that there is a bearing of that view of the case upon the effect of the transfer which must have had its due weight given to it if it could have been satisfactorily proved to your Lordships that any fraudulent intention had existed. In the first place it would very materially have diminished, or rather, I might say, have entirely prevented, the effect of the 30th section of the Act of 7 & 8 Vict., which says that acts done by those *de facto* purporting to be directors shall be valid, even although it is subsequently discovered that there was some error in their appointment. I would most materially have affected the operation of that section

if it had been shewn that in the breasts of those parties who purported to act as directors there had all along been implanted a consciousness that they were not such directors at all, that they had been fraudulently and improperly appointed, that they had been appointed for an improper object, and therefore could not, in any sense, be said to have fallen within the scope of a clause which has for its purport and effect the correction of all injuries to others in consequence of innocent misapprehensions which may have taken place with regard to those who are *de facto*, and, as they suppose, *de jure* exercising the rights of directors. But farther than that, if it could have been shewn that this, instead of being an actual sale and transfer of shares, was a mere mode of shuffling off responsibility, that it was never intended to operate as a real and substantial transfer, that it was, in fact, a comedy between the parties to it in order to deceive third persons; then, again, a very serious question would have arisen as to whether or not the name of Mr. *Bush* should not continue upon the register as it had originally been placed there, and the name of Mr. *Morrison*, who was merely brought in to play his part in the comedy, erased therefrom.

My Lords, I have had great satisfaction in finding that the noble and learned Lord who first addressed your Lordships has not, although he is not satisfied, as he has said, with all that has taken place with reference to the proceedings of Mr. *Bush* in this transaction, adopted the view of this being a fraudulent concoction between Mr. *Bush* and Mr. *Morrison;* and that as far as regards the noble and learned Lord who first decided this case, the Master of the Rolls, and the noble Lord who sits opposite to me and who addressed your Lordships second on the present occasion, as well as my noble and learned friend who addressed your Lordships last, there is a general concurrence of opinion, or acquiescence in the opinion, that no such fraudulent intent has been in any way manifested or declared throughout the course of the transactions.

I noticed, on the former occasion, as regarded the position of the company, the extreme difficulty of any person knowing exactly what the position of a company of this character was. We know, from painful experience, by what has recently occurred, how extremely difficult it is, even with persons having the best intentions,

1873
MURRAY
v.
BUSH.

with regard to the well-known subject of the insurance of human life, to arrive at a thoroughly just conclusion as to the correct data upon which that insurance should be conducted; but as regards this question of the insurance of cattle, I suppose there are not sufficient data in existence at the present moment, and certainly there are no tables in existence by means of which we could arrive at a perfectly clear and sure basis upon which to demand premiums in respect of such insurances. We do not however require, for the purpose of the present case, to speculate on this subject. The very question as to the difficulty of arriving at a knowledge of the exact position of a company of this kind was before Lord *Cottenham* in the case of this very company, in a case which is reported in the first volume of *Macnaughten & Gordon* (1). There it was sought to wind up the company in the year 1848. Two questions arose: first, whether it was a company within the provisions of the *Winding-up Act;* and, secondly, if so, whether the company had been shewn to be insolvent. Lord *Cottenham* considered the last question first, as he said, to avoid coming to any unnecessary conclusion on the first point; and being clearly of opinion that insolvency had not been shewn, he commented upon the extreme difficulty of ascertaining whether a company engaged in such transactions as the present was or was not insolvent until some better data existed than existed at that time with regard to the exact amount of premiums to be charged, and the exact amount of risk incurred in an insurance of such a novel description. It appears that all this matter was discussed from the year 1848 to the year 1858, and that, in consequence of these very difficulties, the premiums had been raised, in consequence partly also, I believe, of the cattle plague having then been introduced into this country.

As far as I can see from any part of the evidence before your Lordships, there does not seem to have been any reason for apprehending, at the time when these transactions took place, that the company was in an insolvent condition, the only ground for that alleged appearance of things being the report of Mr. *Evans*. I commented on the report of Mr. *Evans* on a former occasion at some length, and my noble and learned friend has also com-

(1) *Quære, Ex parte Spackman*, 1 M. & G. 170; 18 L. J. (Ch.) 261.

mented upon it, and given a far more clear and distinct analysis of what the true effect of that report must be taken to be. I do not intend, therefore, to repeat myself on that subject.

But there is one single remark which I wish to make with reference to Mr. *Bush's* transfer of his shares, as regards his *bona fides* in doing what he did in 1859, when the transfer was effected, and his views of the position of the company at that time. It has already been observed by my noble and learned friend who spoke last, that Mr. *Bush* did not hawk about his shares, that he made no tender of his shares to any one, that he was applied to to sell, that he was offered a price for his shares, that that price being considerably below par he altogether refused to receive it, and he ultimately only came to this agreement to sell his shares in the firm belief, as he has asserted—and there is every reason on the face of the agreement to suppose that to be so—that the shares were worth their full value at par. The agreement he entered into, after he might have obtained a sum of £600 down, was an agreement that he was to be paid £2000 in two years' time, but that if the concern did not succeed (so confident was he of success), or if it was wound up within two years, then that he should be paid nothing whatever.

And this farther remark, which was made by my noble and learned friend in his address to your Lordships, arises upon the transaction, that the transfer to Mr. *Morrison* was in no way necessary on the part of Mr. *Bush* for the purpose of constituting him a director, or for carrying out any such fraudulent purpose as has been suggested, because Mr. *Morrison* had already had a transfer of a sufficient quantity of shares from General *Hope* to qualify him as a director, provided that the other difficulty had not existed with respect to the deed of adherence to the company not having been executed. That being so, there was no motive such as has been assigned to Mr. *Bush* for the transfer of these shares in order to create Mr. *Morrison* a director, and to substitute him as a director in the place of Mr. *Bush*. It would have been quite sufficient to rest the matter on General *Hope's* transfer, and Mr. *Bush* might have retired from the directorship and disposed of his shares in any manner he thought proper, if he had not thought fit to sell them, in the manner which has been described, to Mr. *Morrison*.

1873
MURRAY
v.
BUSH.

Farther, from the fact of 30*s.* per share being offered to him, I think your Lordships have a strong presumption at once that the company was by no means considered, either by the outside public, or by those persons who were possessors of shares, to be in a hopeless condition. Persons do not give 30*s.* a share to take part in a concern which is quite hopeless. The sum is too substantial for that. No doubt the concern was in a depreciated condition, but there is not one reason on the face of these proceedings from beginning to end for thinking either that Mr. *Bush* or anybody else (certainly not Mr. *Bush*, who refused 30*s.* per share) thought that the company was in that condition of extreme depression which it afterwards turned out *de facto* in the result to have been.

Now having said so much, I do not enter again into that part of the argument as to whether or not the transfer was valid, because it has been wholly exhausted by the address which has just been delivered to your Lordships. It appears to me, I confess, that the parties might have relied on the 30th section alone, considering the *bona fides* of the transactions, for the act of the *de facto* directors being valid; because it is no answer to that to say that they knew they had not executed the deed. The question is whether they knew that not executing the deed would invalidate their position as shareholders, and consequently their position as directors; for although the maxim "*Ignorantia juris non excusat*" is particularly applicable to any case in which you seek to put responsibility on a party, yet that very ignorance of law is, I apprehend, a portion of that state of ignorance which is meant to be excluded expressly by the 30th section of the Act, in order to render valid as regards third parties who are dealing with such persons, those acts which are performed by them in the ministerial performance of their duty. I apprehend, therefore, that the circumstance of these directors not having executed the deed would not, even if it had been a fatal objection to their position, have invalidated the acts which they so performed.

But farther than that, I wish to call your Lordships' attention for a single instant to the 186th section of the deed of settlement, which, as well as the 185th section, is important to be referred to upon this subject. The 185th section directs that the deed shall be executed at the office of the company, or at such other place

as the directors shall appoint. I quite agree with my noble and learned friend who first addressed your Lordships, that that does not mean that they are to dispense with the execution of the deed altogether, but it simply says that they are to direct it to take place wherever they shall think fit. But the 186th section is important in this point of view. It provides that the deed of adhesion itself shall be prepared by the directors, and it is then to be propounded by them to the person who is becoming a new shareholder. Now that is a point which is important in this respect. It does bring the case extremely near to the case of *Bargate* v. *Shortridge,* in which it was distinctly held that the directors cannot rely upon any default of their own in the non-performance or non-execution of a deed. It was the duty of the directors to have this deed prepared; it was the duty of the directors to have it executed by Mr. *Morrison* no less than it was the interest of Mr. *Bush,* who was retiring, to have it done; it is true that it was his interest to have it done, but it was no part of his business to have it done, and he could have taken no part therein. He, as transferor, having got rid of all his shares, could have taken no part beyond seeing that Mr. *Morrison* did execute the deed when propounded to him by the directors, and if Mr. *Morrison* declined so to do, he would have been obliged to take legal proceedings to compel him to execute it. But it being incumbent, in the first place, on the directors to see that the thing was done, I apprehend that it was impossible for them to say to Mr. *Bush* afterwards—"That not having been done which it was our duty to see was done, you shall still remain shareholder, although we have formally returned by our certificate this transfer as having been made to Mr. *Morrison,* because we have not taken care that Mr. *Morrison* executed that deed which he should have executed within the subsequent month."

My Lords, I wished on the present occasion merely to refer to those two points, because in my former opinion I have so fully stated all the reasons for arriving at the conclusion I arrived at, that I should think it a waste of your Lordships' time if I were to repeat those views. I frankly confess that I feel greatly relieved in this matter by having the concurrence of my noble and learned friend who spoke last, and who has expressed far

1873
MURRAY
v.
BUSH.

more clearly than I have done either on the former occasion, or on this, the grounds, valid grounds, as it appears to me, for arriving at that conclusion.

LORD CHELMSFORD:—My Lords, I would submit to your Lordships' consideration whether the present affirmance of this Order should be with or without costs.

LORD CAIRNS:—I do not know that it can be suggested that there is any absolute rule upon that subject. In a case which has caused such difference of opinion, and upon which such difference of opinion might well be entertained, as on this case, your Lordships would not be disposed, I think, to say anything as to costs. Let the Order be that the appeal is dismissed without any mention of costs. I forget whether the case was argued by the official manager, or only by counsel for the executors of Mr. *Houldsworth*. The costs of the official manager are always dealt with in a winding-up.

The *Solicitor-General*:—The official manager does not appear before your Lordships. He will get his costs in the Court below.

LORD HATHERLEY:—I acquiesce in the view which has been expressed by my noble and learned friend. Certainly upon the former occasion I gave no costs, for I thought that the parties themselves were in a great degree responsible for the large amount of confusion which there has been in these transactions.

Order appealed from affirmed; and appeal dismissed.

Lords' Journals, 5th May, 1873.

Solicitors for the Appellants: *J. Elliott Fox*, for *Earle, Son, Orford, Earle, & Milne.*

Solicitors for the Respondent: *Warry, Robins, & Burges.*

JAMES RANKIN AND OTHERS . . . . . APPELLANTS;

AND

LEWIS POTTER AND OTHERS . . . . . RESPONDENTS.

1872
June 28;
July 1, 4, 5.
1873
Feb. 24;
May 5.

Insurance—Total Loss—Perils of the Sea—Other Causes—Abandonment—Notice.

It is a principle of insurance law that no abandonment is necessary where there is nothing which, on abandonment, can pass to or be of value to the underwriters. Where, therefore, there was a policy on ship, and also on charterparty freight (that is freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port), and the ship was so injured on the outward voyage that the shipowner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charterparty freight, and, consequently, there was no necessity for abandonment to him.

The damage to the ship from perils of the sea during the voyage, covered by the policy on ship, being such as to justify abandonment to the underwriter on ship before the cargo was put on board, the insured freight could not be earned, and there would therefore be a total loss on the policy on freight.

A ship sailed on its outward voyage to *New Zealand*. More than a month afterwards the owners chartered it to *M.* to bring home a cargo from *Calcutta*. By this charterparty, after discharging at *New Zealand*, it was to sail to *Calcutta*, and being there "tight, staunch, and strong, and everyway fitted for the voyage," the charterer bound himself to put on board a specified cargo for *England* at a stipulated freight. The owners then effected a policy, in the usual form, against perils of the sea, &c., upon the freight to be earned on this homeward voyage.

The ship was seriously injured in the outward voyage; it was repaired as well as the master, with insufficient funds, and at a place not capable of making full examination and effecting complete repairs, could get it repaired; and with the ship thus partially repaired he sailed from the place where the ship then was, and arrived at *Calcutta*, where the fullest examination and the completest repairs could be had. He immediately tendered the ship to the agents of the charterers for the homeward cargo. They, on the ground that the charterer had become bankrupt, refused to load a cargo. The master then had the ship fully examined, and it was found that the injuries on the outward voyage had been such that the complete repair of the ship, to render it fit for the voyage home, would exceed the value of the ship when repaired, and the amount of freight to be earned. The owners, on receiving this intelligence, abandoned:—

Held, that this was a loss of freight occasioned by the perils of the sea:

Held, also, that no notice of abandonment to the underwriters on freight was necessary:

Held, also, that, if a notice of abandonment to the underwriters on freight had been necessary, the notice here would not, under the circumstances, have been too late.

THIS was an appeal against a judgment of the Court of Exchequer Chamber, which had reversed a previous judgment of the Court of Common Pleas (1).

(1) Law Rep. 3 C. P. 562; Ibid. 5 C. P. 341.

1872-3
RANKIN
v.
POTTER.

The facts having been fully stated in the reports of the case in the Courts below, it is not necessary here to give more than a summary of them. The Respondents in the appeal (the Plaintiffs in the Court below) were mortgagees in possession of the ship *Sir William Eyre*, which, under the command of Captain *Blakey*, sailed, on the 7th of December, 1862, from *Greenock*, bound to *Southland*, thence to *Dunedin*, in *Otago, New Zealand*, having on board a general cargo and a large number of emigrant passengers.

On the 9th of February, 1863, the ship being then on its outward voyage, Messrs. *Potter* entered into a charterparty with one *De Mattos*, by which it was agreed that the ship, after discharging cargo and landing passengers at *Otago*, was to proceed to *Calcutta*, and there, "being tight, staunch, and strong, and everyway fitted for the voyage," should take in a cargo to be provided by *De Mattos*, and bring the same to *Liverpool* or *London*. The freight agreed upon was "£4 per ton until delivered, such to be computed according to the tonnage scale of the *Bengal* Chamber of Commerce." After entering into this charterparty, Messrs. *Potter* effected a policy on this chartered freight, in which the voyage was described as "at and from the *Clyde* to *Southland*, whale there, and thence to *Otago* (*New Zealand*), and for thirty days in port there after arrival," with leave to call at intermediate ports. "And it shall be lawful for the ship, in this voyage, to proceed and sail to, and touch and stay at any ports or places whatsoever without prejudice to this insurance. The said ship, &c., goods and merchandise, &c., for so much as concerns the assured, by agreement between the assured and the assurers in this policy, are and shall be valued at £4000, on homeward chartered freight valued at £ ."

The ship sailed from *Greenock* on the 7th of December, 1862, and arrived at *Bluff Harbour, Southland*, on the 23rd of April, 1863, and immediately afterwards took the ground there. On the 22nd of May the ship floated, and on the 27th of May a survey was held. On this survey the report made was that the ship appeared to have sustained no damage which would prevent it from proceeding on the voyage, but that it might safely proceed to its final destination. As, however, the surveyors were "not able to ascertain if any damage was done to the vessel below water," they recommended that it should be re-surveyed, and its bottom examined "at the first convenient port." Some other groundings

occurred, and it was not till the 1st of July that the vessel was able to leave for *Dunedin*. On the 4th of July it arrived at *Port Chalmers*, which is the port of *Dunedin*. Surveys were made there, but they were necessarily of an incomplete kind, for there was no dry dock or patent slip in *New Zealand*, and consequently the real nature and extent of the damage the vessel had sustained could not there be discovered, although at *Port Chalmers* the cargo had been totally discharged. The ship remained at *Port Chalmers*, and while there the captain (who could not obtain the funds he wanted), in order that his stay might not be wholly unproductive to his owners, allowed the ship to be made a depôt for coals, and received as rent a sum of £778 3*s*. 5*d*. Though the ship could not have been fully examined and repaired at *Port Chalmers*, such an examination could have been had at *Sydney*, which was only eight days' sail from that place. It did not appear, however, that the master knew of this, and, believing that the ship was not seriously injured, but might proceed safely to *Calcutta* in ballast, he, on the 14th of April, 1864, as soon as he had received remittances from his owners, and some temporary repairs had been effected, sailed for *Calcutta*, where he knew that all necessary repairs, whatever they were, could be done. He arrived there on the 7th of June. On his arrival he went to the agents of *De Mattos*, and called on them to carry out the charterparty and put a cargo on board; but *De Mattos* had, in December, 1863, stopped payment, and his agents therefore declined to act for him in the matter.

The ship was put into a dry dock at *Calcutta*, and surveyed several times. The surveys and estimates shewed that if the repairs really necessary to make the ship seaworthy, and enable it to bring home a cargo, were executed, they would exceed the value of the ship when repaired; and one paragraph of the Case (par. 24) stated, "It is admitted that the sea damage which the ship sustained at *New Zealand*, during the time covered by the policy, was such as would have justified an abandonment and claim for a constructive total loss." At the time of the departure of the ship from *Greenock*, in December, 1862, it was worth about £8000; in *Calcutta*, when unrepaired, it was worth about £3000. The surveys and estimates were duly forwarded to Messrs. *Potter*, and on the 2nd of August, 1864, on receipt of the last of them, which

1872-3
RANKIN
v.
POTTER.

was dated in the previous June, Messrs. *Potter* gave to the underwriters notice of abandonment and of claim as for a total loss.

The ship, after the surveys, was moored in the *Hooghly*, and whilst so moored was, on the 5th of October, 1864, totally wrecked in a cyclone.

Upon the trial of the cause at *Guildhall*, before Lord Chief Justice *Bovill*, a verdict was taken for the Defendant, with leave to move to enter it for the Plaintiff. A rule obtained for that purpose was, in Trinity Term, 1868, discharged (1), but in the Exchequer Chamber the decision was reversed (2), it being considered by the majority of Judges there that the ship, by perils of the seas, had been incapacitated from earning the freight; that the assured were not bound to repair at any cost in order to earn the chartered freight; but, on the contrary, were entitled, as prudent men, to decline such repairs, and to abandon the vessel; that by abandonment of ship they did not lose their right to claim for a total loss of this chartered freight; and that, under the circumstances, the delay of the giving notice of abandonment was sufficiently accounted for, and the notice, if notice was necessary, was not too late. Mr. Baron *Cleasby* dissented from this decision, being of opinion that the loss of the freight must be treated as occasioned by the act of abandonment, and not by the perils of the seas; that the abandonment was an election which disabled the assured from recovering as for a total loss of freight by constructive total loss of the ship; that notice of abandonment was necessary, and that the notice given in this case was too late.

This proceeding in Error was then brought. The Judges were summoned, and Mr. Baron *Martin*, Mr. Baron *Bramwell*, Mr. Justice *Blackburn*, Mr. Justice *Mellor*, Mr. Justice *Keating*, and Mr. Justice *Brett* attended.

Mr. *Benjamin*, and Mr. *Cohen*, for the Appellant:—

The questions in this case are, whether a notice of abandonment was necessary, whether it was given in proper time, and whether the incapacity to proceed on the voyage and to earn the freight insured arose from the perils insured against, or from the conduct of the parties themselves.

(1) Law Rep. 3 C. P. 562. (2) Law Rep. 5 C. P. 341.

The facts here shew, that whatever was the result of the perils of the sea had happened in August, 1863, just one year before the notice of abandonment was given. If, therefore, a notice of abandonment was necessary, it was not given in proper time. The assured has an election; he is not bound to abandon: *Phillips* on Insurance (1); but when he makes his election he must give notice of it in proper time, and he must abide by the consequences of his election. Here the master, who was acting for the owners, made the election to go on with the adventure; it was made with full knowledge that the vessel had suffered severe injury. Having made their election, the owners cannot be allowed many months afterwards to change their minds and throw all the loss on the insurers.

The loss was not occasioned by the perils of the sea, but arose from other causes. After reaching *Calcutta* the ship was tendered to the charterer, and he was called on to put a cargo on board, in conformity with his charterparty. The ship was then treated as a ship capable of taking the chartered cargo to *England*. The refusal to put it on board made by the charterers' agents at *Calcutta*, and not the injury to the ship from perils of the sea, was the real cause of the loss of the freight, and it was also the real reason for the abandonment. The tender of the ship for a cargo, and the formal demand that the charterer should put one on board, shewed that the owners were then acting as if no ground for abandonment had arisen from the perils of the sea, and manifested their election to continue, and not to abandon, the adventure. Now (at all events by the American law) "the insurers ought to be informed of the grounds of abandonment, that they may determine whether to accept:" *Phillips* on Insurance (2), quoting *Suydam* v. *Marine Insurance Company* (3), and several other cases. There seems to be no good reason for saying that in this respect there is any difference between the law of the two countries. That is an additional ground for requiring the notice of abandonment to be given in reasonable time.

The interest insured here was not freight, but an interest to be derived from the charterparty on procuring a cargo, and so earning

(1) Sect. 1493. (2) Sect. 1684.
(3) 1 Johns. (N. Y.) 181, 2nd Ed. 138.

1872-3
RANKIN
v.
POTTER.

freight. The underwriter, therefore, did not insure freight; he did not insure even a *chose in action*—an existing right to a certain amount of money—but only a mere speculation, a claim on the part of the assured to have a homeward freight supplied to him. Nothing short of what would amount in law to the destruction of the ship could justify the owner in claiming for a total loss of freight: *Moss* v. *Smith* (1); *Rosetto* v. *Gurney* (2). He might have lost that from causes other than the destruction of the ship. Here he did lose it from other causes, namely, the insolvency of the charterer and the consequent refusal of the charterer's agents to supply a cargo. That cause of loss was not a thing insured against. All that the insurer undertook was to indemnify the owner against the loss of the freight on the cargo by the destruction of the ship through perils of the sea. He would have had a right to repair the vessel; and till he had made his election whether he would go on with the adventure or abandon it (at least within some reasonable time), the insurer might be bound. But when he did elect to go on and disregard all the injuries which the perils of the sea had caused, he lost his right to abandon on account of those perils. There is no case in which, after full knowledge by an owner of the damage done to his vessel by perils of the sea, he has been allowed to go on as if those perils had never occurred, and then, after finding out that he was taking an unprofitable course, to claim to abandon the adventure, founding his claim on injury from those very perils which he had previously disregarded. *Fleming* v. *Smith* (3) expressly established these points. Lord *Campbell* there, adopting the term "constructive total loss," gives as the test that "if a prudent uninsured owner would not have repaired the vessel, but would have sold it to be broken up, that amounts to a total loss." If he will not do so, but chooses to go on with the adventure, it is not a total loss; it is then only a constructive loss, and notice of abandonment becomes absolutely necessary. He may wait till he gets complete information, or he may elect without getting it; but in either case his election binds him. And here it is a fact that the vessel itself was insured with other people, and a total loss claimed on the vessel as happening months before, while

(1) 9 C. B. 94; 19 L. J. (C. P.) 225. (2) 11 C. B. 176; 20 L. J. (C. P.) 257.
(3) 1 H. L. C. 513.

the abandonment here treated the loss as having occurred months afterwards. The two things cannot be allowed to stand together. It is impossible that, even in point of law, there can be two separate losses of one vessel in the same voyage. If this vessel was in existence as a ship at *Calcutta*, it could not have been totally lost at *Bluff Harbour*. Yet here the loss of the chartered freight is alleged to have been occasioned by a total loss of the ship at *Bluff Harbour*.

The propositions in point of law for which the Appellant contends are these: first, that by the insurance law of *England*, where the thing exists in kind, however deteriorated or damaged, there can be no total loss without abandonment; secondly, the doctrine of abandonment itself takes its rise in the necessity of imposing on the assured the duty of election; thirdly, the election once made is irrevocable, the rights of all parties are determined by the act of election, and cannot afterwards be altered.

Nobody pretends to doubt this last proposition, but an exception is here sought to be introduced upon it by saying that in this case, owing to the particular nature of the insurance, abandonment was not necessary. Why not? First, it is said, because this was an insurance, not on ship, but on freight, and that as that was freight to be earned, there was nothing to abandon. Next, that if necessary, there was here an abandonment. But if abandonment was necessary, then comes the question whether there was abandonment in proper time. [THE LORD CHANCELLOR (Lord *Hatherley*):—Do you contend that in this case there was no loss by perils of the sea?] There was not, under the circumstances which existed here. The earliest cases on this part of the subject are *Martin* v. *Crokatt* (1); *Cambridge* v. *Anderton* (2); and, particularly, *Roux* v. *Salvador* (3), since recognised in this House (4) in *Fleming* v. *Smith*, though treated there as inapplicable on account of particular facts. The whole law of abandonment was, in *Roux* v. *Salvador*, discussed by the Chief Baron, Lord *Abinger* (5); and the result arrived at is, that where constructive total loss is claimed there must be an abandonment, and that abandonment must be made in reasonable time,

(1) 14 East, 465; but see *Read* v. *Bonham*, 3 B. & B. 147.
(2) 2 B. & C. 691.
(3) 3 Bing. N. C. 266.
(4) 1 H. L. C. 513.
(5) 3 Bing. N. C. 275, *et seq.*

1872-3
RANKIN
v.
POTTER.

and cannot be made after there has been a clear election to prosecute the adventure. These cases negative the "deathblow" doctrine, which would have got rid of the necessity for abandonment under certain circumstances, and they firmly establish the principle that if an assured means to insist on a total loss, he must give a proper notice of abandonment.

The next point is as to the conduct of the master. *Benson* v. *Chapman* (1) was originally decided in favour of the assured, but the decision was reversed in the Exchequer Chamber, and the reversal sustained in this House (2). There the master had elected to repair, and actually brought home the ship. It was expressly found that everything had been done *bonâ fide*, yet an election having been made, the assured was held not to be entitled to recover as on a total loss. *Knight* v. *Faith* (3) is another instance where the circumstances not constituting an actual total loss, the assured were held bound to give notice of abandonment, and the "deathblow" doctrine was in reality repudiated. In *Stewart* v. *The Greenock Marine Insurance Company* (4) there was a faint attempt to re-establish the "deathblow" doctrine; but in *Knight* v. *Faith*, with reference to this very matter, Lord *Campbell* said (5): "It was argued before us that the ship must be taken to have actually perished, because it is stated that while under the protection of the policy she received her 'deathblow' by the perils insured against; but we cannot give such weight to this metaphorical expression. We are bound to look to her actual condition after the injury she had sustained and the manner in which she was treated. We still find her surviving as a ship, with her crew on board, several weeks after the risk had expired." So here, several months after the risk had expired, this ship actually sailed on a voyage to *Calcutta* and arrived there, and, existing as a ship, was tendered to the charterer to bring a cargo to *England*. In *Knight* v. *Faith* (3) the ship was actually sold in the port it had reached for the sum of £72, yet, there not having been a proper abandonment, the owner could only recover as for a partial loss. *The Scottish Marine Insurance Company* v. *Turner* (6) was, in fact,

(1) 6 Man. & G. 792; 7 Scott, 625; 5 C. B. (Ex. Ch.) 530.
(2) 2 H. L. C. 696.
(3) 15 Q. B. 649.
(4) 2 H. L. C. 159.
(5) 15 Q. B. 656.
(6) 1 Macq. Sc. Ap. 328, 334.

a consequence of the previous decisions in *Fleming* v. *Smith* (1) and *Benson* v. *Chapman* (2).

It is admitted that there are cases in which there may be a recovery as for a total loss without abandonment: *Green* v. *The Royal Exchange Assurance Company* (3), *Idle* v. *The Royal Exchange Assurance Company* (4), and *Mount* v. *Harrison* (5); but in all these cases there was an actual stranding, and the sale was effected at the moment as the best thing for the interests of all concerned. Here the circumstances were very different. The facts shew that an irrevocable election was made. The master sailed from *Bluff Point* to *Dunedin* with the ship as the property of the owners, earning freight on the outward cargo, and afterwards getting a profit by loading coals. Secondly, the master did that wilfully, of his own accord, and with a view to profit. Thirdly, he did these things by effecting partial repairs for the owners' benefit, and he repeated this course of conduct at *Calcutta*, until he found that the repairs really necessary for a voyage to *England* were too expensive to be undertaken with the hope of a profitable result. But it was then too late for him to go back; his election had been made, and he could not recall it. Fourthly, he again performed an act of election when he tendered his vessel to the charterers, treating it as the vessel of his owners, and requiring the charterers to perform the contract entered into with his owners. Fifthly, there was not here any act of repudiation by the owners of the act of the master, but up to the last moment there was a real adoption of all that he had done.

[*Hamilton* v. *Mendez* (6), and *Cologan* v. *The London Assurance Company* (7), were also referred to.]

Sir *G. Honyman*, Q.C., and Mr. *Butt*, Q.C. (Mr. *Lanyon* was with them), for the Respondents:—

If this is to be treated as a case where there has been a total loss of the ship, actual or constructive, then no notice of abandonment can be necessary. If notice is necessary, then, under the circumstances here, it was given in time.

(1) 1 H. L. C. 513.
(2) 2 H. L. C. 696.
(3) 6 Taunt. 68.
(4) 8 Taunt. 755.
(5) 4 Bing. 388.
(6) 2 Burr. 1198; 1 Sir W. B. 276.
(7) 5 M. & S. 447.

1872-3
RANKIN
v.
POTTER.

This is an insurance on freight to be earned on the homeward voyage from *Calcutta* to *London*. The undertaking of the underwriter is that the assured shall not be prevented from earning it by any peril happening on the outward voyage. Our argument is that while the ship was at *New Zealand*, which was in the course of the outward voyage, such an event happened as did prevent this ship from earning freight on the voyage home. The freight here must be taken to be freight to be earned by this particular vessel, and therefore this case is not affected by those in which there were transhipments of goods to other vessels. The only ship that could be tendered to *De Mattos* under the charterparty was this vessel, the *Sir William Eyre*, which by the terms of the charterparty was to be, when so tendered, "tight, staunch, and strong, and every way fitted for the voyage." If this vessel could not be so tendered, and it could not, then there has been a total loss of the freight, and a loss by the perils insured against. Then was there anything which had happened to this ship that prevented it from being so tendered and earning the freight? No doubt there was. The case itself (par. 24, see *ante*, p. 85) states the fact. But what is there admitted was not known to the assured at the time it occurred. They could have abandoned at that time, but it is not necessary, as a condition precedent to their now recovering, that they should have done so, they being then in ignorance of the real state of the damage done to the ship. There is no question here as to *bona fides* on the part of the master; and the circumstances were such as to justify what he did; he made every effort to pursue the voyage and to earn the chartered freight. He could not succeed, and there has been a total loss of freight. *Moss* v. *Smith* (1) and *Rosetto* v. *Gurney* (2) do not affect the claim made in this case, the circumstances in both being very different from what they are here, and the real question in each case being whether the facts proved could establish a case of total loss. In *Farnworth* v. *Hyde* (3) the vessel was stranded and in danger of falling to pieces; the cargo was timber (not a perishable article), the master sold it because the expense of forwarding it would have

(1) 9 C. B. 94; 19 L. J. (C. P.) 225.
(2) 11 C. B. 176; 20 L. J. (C. P.) 257.
(3) 18 C. B. (N.S.) 835; 34 L. J. (C. P.) 207; on appeal, Law Rep. 2 C. P. 204.

exceeded its value on arrival. The assured (though no notice of abandonment was ever given) was held entitled to recover as for a total loss.

Whether the ship could earn the freight was a matter which Lord *Truro* describes as supplying the test of the right of the assured to recover. In the *Scottish Insurance Company* v. *Turner* (1) he says: "The ship, though so damaged as not to be worth repairing, had yet performed the voyage. To determine whether there has been a loss of freight within the meaning of the policy on freight we must consider what are the obligations which the underwriter takes upon himself by that policy. The underwriter on freight binds himself to indemnify the assured when prevented from performing the voyage insured by any of the perils mentioned in the policy." And, adopting what Mr. Baron *Alderson* stated to this House in *Benson* v. *Chapman* (2), His Lordship declared that there was no case in which it had ever been held that an action could be maintained against underwriters on freight "where the freight has been actually earned." No doubt that is so; but it is the reverse where it could not be earned because the voyage was lost; and Lord *Truro* goes on: "Freight may be lost in the sense that, by reason of the perils insured against, the ship has been prevented from earning freight. . . . In that sense the underwriter on freight is liable;" but for any loss of freight after it had been in fact earned, and because the owner was deprived of it by circumstances unconnected with the contract between himself and the underwriter, no action could be maintained. This case is one which comes under the first of these two classes, and the action is maintainable.

If the tender of the vessel at *Calcutta* to take a cargo to *England* is relied on as proof that the master then treated the vessel as capable of earning the freight, the answer is, that that was made at a time when the master was entirely ignorant of its real state, when the full survey had not been had, and the extent of the injury the vessel had received had not been ascertained. That injury really was in itself so extensive and so incapable of sufficient repair that *De Mattos* would not have been bound to accept such a ship under his charterparty, for it was not "tight,

(1) 1 Macq. Sc. Ap. 328, 334. (2) 2 H. L. C. 721.

1872-3
RANKIN
v.
POTTER.

staunch, and strong, and every way fitted for the voyage." To bind a charterer to accept a vessel it must be in such a condition that it could at the moment of tender load a cargo, and especially it must be so with words such as those just quoted existing in the charterparty. Here the ship was unfit to carry cargo, and was so by reason of the perils of the sea.

This was admitted by Mr. Justice *Willes* in the judgment in *Potter* v. *Campbell* (1), where he said: "We must take it to be the fact that the damage sustained at *Bluff Harbour*, although the extent of it was not known at the time, was such that the repairs would have exceeded the value. . . . The damage which made it necessary to expend so large a sum of money was mainly attributable to the injury sustained at *Bluff Harbour*." The insolvency of *De Mattos* was, therefore, wholly immaterial.

The doctrine for which *Stewart* v. *Greenock Marine Insurance Company* (2) and *Benson* v. *Chapman* (3) were cited is not disputed. No doubt if the assured on ship abandons to the underwriter on ship, the freight in the course of being then earned being an incident to the ship on that voyage, the right to that freight passes to the underwriter on ship. But that principle does not affect the present case. The ship here was not in the course of earning the freight. Here the thing insured was the power to earn the freight of a homeward cargo—a cargo afterwards to be put upon board if the perils of the sea did not prevent it. The ship was irreparably injured by those perils before the cargo that was to give this freight could be put on board. In this case it is sufficient for the assured on freight to make out that the ship had, by the perils of the sea, become unfit to earn the freight. If the particular ship is sold under circumstances which justify the sale, notice of abandonment is not necessary: *Idle* v. *The Royal Exchange Assurance Company* (4).

Here the circumstances did justify the abandonment of the voyage, and there was no necessity for notice of abandonment. There was, in fact, nothing to abandon: *Phillips* on Insurance (5).

WN (1867) 221.

(1) 16 W. R. 399. Printed papers in the case, 165.
(2) 2 H. L. C. 159.
(3) 2 H. L. C. 696.
(4) 8 Taunt. 755; 3 B. Moo. 115.
(5) Sects. 1503, 1649-1650.

1872-3
RANKIN
v.
POTTER.

The cases where notice of abandonment is necessary are those where there is something to be given up. But where the ship is so damaged that the master would be justified in selling it at once, notice of abandonment, even to the underwriter on ship, is not necessary. *Knight* v. *Faith* (1) does not in the least degree impeach the right of the assured here, for there the insurance was upon ship, and the ship existed as a ship, there was something to abandon, and it was sold as a ship, and it being held that the master had sold it without justification, it was held that the assured could not recover as for a total loss. Here there was nothing to abandon. There was a total loss of the ship, a loss occasioned by the perils of the sea, and the liability of the insurer on freight, who had insured against the perils of the sea, occasioning the loss of freight, was therefore established.

There is nothing here in the argument as to election. There was no such election as to deprive the assured of the right to recover. It was done in ignorance of the real nature and extent of the injury which the ship had sustained. A man cannot be bound, even by an election expressly made by him, when it is made in ignorance of all the real facts, which, if known, ought to have determined and would have determined his conduct the other way. In the case of money, if money is paid under an honest mistake of fact, or even a real forgetfulness of fact, it may be recovered back: *Kelly* v. *Solari* (2); *Townsend* v. *Crowdy* (3). So in a case of insurance, if a person in ignorance of the real facts of the case performs an act intended honestly for the benefit of all parties concerned, he is not to suffer a loss of his right. In such a case he cannot be said to elect at all. Here the captain did the best for all parties concerned. Had his ship been so little injured that it could well have been repaired at *Calcutta*, it would have been repaired and would have brought home its cargo. Being found incapable of being repaired, there was no necessity for giving notice of abandonment. But election is not always and necessarily definitive. Where the loss may be partial, or may be total, what is called election will not necessarily, in the first instance, be absolutely binding: *Stringer* v. *The English and Scottish Marine*

(1) 15 Q. B. 649.
(2) 9 M & W. 54.
(3) 8 C. B. (N. S.) 477; 29 L. J. (C. P.) 300.

1872-3
RANKIN
v.
POTTER.

Insurance Company (1). And that had, in fact, been the substance of the decision in *Fleming* v. *Smith* (2).

Notice was given here, but it has been contended that it was not given in time. No notice was here necessary, and therefore the question of time cannot affect it. But assuming notice to have been necessary, then it was in time. It cannot, of course, be disputed that notice must be given in reasonable time; but what is reasonable time is a question of fact, which must be determined by the particular circumstances of each individual case. Here the facts shew that as soon as the state of the vessel was known, the notice of abandonment was given, and the time of knowing the facts is that from which the time for giving notice of abandonment must be calculated. The effect of an abandonment is retrospective: *Arnould* on Insurance (3); going back, as *Emerigon* says (4), even to the commencement of the risk. But, in fact, no notice was necessary. This was a policy on expected freight, and such a policy does not seem to offer anything upon which an abandonment can operate: Phill. 1503; though where freight has been earned in part it might be different, and there the insurer on freight might be entitled to the benefit of that in account: Phill. 1649, 1650.

There is no objection to the right of the Plaintiffs to recover, although this is a policy not on freight in the course of being earned, but on freight intended to be earned at a future time. Though this insurance may be called the assurance of a possibility of earning freight, a mere *chose in action*, or even less, still it is an insurable interest: *Foley* v. *United Fire and Marine Insurance Company* (5).

Mr. *Benjamin* replied.

The following questions were put to the Judges:—

1st. Was there a loss by the perils insured against during the term of the policy?

2nd. Was notice of abandonment either of ship or freight, or of

(1) Law Rep. 4 Q. B. 676.
(2) 1 H. L. C. 513.
(3) Vol. ii., pt. 3, c. ix., s. v., p. 1178.
(4) Ibid, n.
(5) Law Rep. 5 C. P. 155.

1872-3

RANKIN v. POTTER.

both, necessary to enable the Plaintiffs to recover for a total loss on the policy on freight?

3rd. If notice of abandonment was necessary, was the notice given in time?

4th. If notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given in time, does the want of due notice as to the ship affect the right of the Plaintiffs upon the policy on freight?

5th. Was there any such conduct on the part of the assured after the time of the alleged constructive loss of the ship as discharged the underwriters from their liability upon the policy on freight?

6th. Ought the judgment to be for the Appellants or the Respondents?

1873

Feb. 24.

MR. JUSTICE BRETT:—

My Lords, in order to answer your Lordships' questions, it seems to me convenient to determine, in the first place, what is the correct interpretation of the policy in respect of which those questions arise, and to point out its peculiarity. What is the subject-matter insured? The description is that the insurance is made "on homeward chartered freight." Having regard to the surrounding circumstances when the policy was made, to these words of reference, and to the case, the policy is not on homeward freight generally, *i.e.* on any homeward freight, but on the homeward chartered freight to be earned under the charterparty of the 9th of February, 1863. It was argued that the subject-matter insured was not freight, strictly so-called, but some right which the counsel described at different times in different terms. It seems to me that those terms are either other phrases to describe the charterparty freight I have mentioned, or that they do not describe what is the only subject-matter insured by this policy. The voyage insured, as descriptive of the voyage during which the perils insured against may arise, is a voyage "at and from the *Clyde* to *Southland*, while there, and thence to *Otago* (*New Zealand*), and for thirty days, in port there, after arrival." This is a different voyage from, and does not comprise any part of the voyage on which the charterparty freight can be earned, which latter is a

1873
RANKIN
v.
POTTER.

voyage from *Calcutta* to *Liverpool* or *London*. The subject-matter insured then is freight; the freight insured is not any, but one particular freight; it is not freight which might be earned on the voyage insured or part of it; the goods in respect of the carriage of which the insured freight may be earned, cannot be at risk during any part of the voyage insured; and therefore the loss of freight covered by this policy cannot occur through damage to goods by a peril insured against, but only through damage to the ship. Assuming then, this to be a valid policy, which is not disputed, the true interpretation of the contract seems to be, that the insurers undertake to indemnify the assured if there should be a loss of the freight to be earned by the charterparty, in consequence of and proximately caused by such injury to the ship from a peril insured against during the voyage from *England* to *New Zealand*, as will prevent the assured from being able to earn the whole or any part of the charterparty freight on the voyage from *Calcutta* to *England*.

The next matter material to be observed seems to me to be that there is only one contract to which the Plaintiff and the Defendant are both parties, namely, the policy; and there are only two contracts with which both of them are concerned in this matter, namely, the policy and the charterparty referred to in the policy. The Defendant is in no way a party to the policy on ship. He incurs no liability under it and has no rights by virtue of it. It seems therefore contrary to all rule to argue, either as for or against him, from anything depending for its materiality on the existence or non-existence of the policy on ship.

It seems to me convenient, in the next place, to consider what does or does not amount to a loss, and what amounts to a total loss under ordinary policies on freight. On an ordinary policy "on freight" in general terms there is no loss at all on freight for which the underwriter on freight is liable, by reason of partial damage to the ship, however great, causing an average loss on a policy on ship, or of partial damage to cargo, causing an average loss, however great, on the cargo generally under a policy on goods. There is a partial loss of freight under a general policy on freight, if there be a general average loss caused by a peril insured against giving rise to a general average contribution; or under certain circumstances

if there be a total loss of part of a cargo; or if in case of total loss of the ship the cargo be sent on in a substituted ship; or if in case of a total loss of the cargo the ship earns some freight in respect of other goods carried on the voyage insured. There may be an actual total loss of freight under a general policy on freight, if there be an actual total loss of ship, or an actual total loss of the whole cargo. An actual total loss of ship will occasion an actual total loss of freight, unless when the ship is lost, cargo is on board, and the whole or a part of such cargo is saved, and might be sent on in a substituted ship so as to earn freight. An actual total loss of the whole cargo will occasion an actual total loss of freight, unless such loss should so happen as to leave the ship capable, as to time, place, and condition, of earning an equal or some freight by carrying other cargo on the voyage insured.

It has become a question in this case whether there may not be on a general policy on freight another kind of actual total loss, namely, by such damage to the ship as would justify notice of abandonment, and make thereupon a constructive total loss of ship under a policy on ship, although there be no loss of cargo, or an average loss of cargo without means of sending on the cargo. In such a state of things the ship may or may not be insured; if the ship be insured, due notice of abandonment of ship may or may not have been given. If the ship is not insured, what must happen upon the assumption? The assumption is that a prudent owner will not repair. Then the ship will not be repaired. If not repaired it will remain a wreck or be sold as a wreck. It cannot, therefore, sail on the voyage insured in the policy on freight. Then such freight is and must be in fact absolutely and totally lost. There is no freight, no chance of freight, to abandon to the underwriter on freight. It has never been suggested that the ship should be abandoned to the underwriter on freight. There is nothing then which can be abandoned to him of which he could take possession or from which he could derive profit. If the ship is insured and due notice of abandonment given to the underwriter on ship, the property in the ship passes to the underwriter on ship. In such cases the new owner of the ship will in almost every case sell it as a wreck. Again, there would be nothing and no chance of anything to abandon to the underwriter on freight. If from

1873
RANKIN
v.
POTTER.

exceptional facilities the underwriter on ship should repair the ship and earn full freight on the voyage described in the policy on freight, such freight would belong to the new owner of the ship; none of it could go to the assured or underwriter on freight; but freight would have been earned on the voyage insured in the policy on freight, and as the insuring of the ship is the voluntary act of the shipowner, and the abandonment is also his act, it has been decided in your Lordships' House that in such exceptional case there is no loss at all of freight for which the underwriter on freight is liable: *Scottish Marine Insurance Company* v. *Turner* (1). If this had not been a decision in your Lordships' House, I should have ventured to think that a valid abandonment of ship was of the same effect as leaving it a wreck, and that the real total loss of freight suffered by the assured on freight was covered by the only policy which could cover it, namely, the policy on freight. But the exceptional case thus mentioned, which, according to the decision causes no loss at all of freight on the policy on freight, need not be farther noticed. It is the same case as if the shipowner uninsured on ship, but insured on freight, should unnecessarily and unreasonably repair the ship, sail it on the voyage insured in the freight policy, and earn full freight. In such case it is held that there is no loss at all on the freight policy. If the ship is insured, but due notice of abandonment of the ship has not been given to the underwriter on ship, then the ship is left on the hands of the assured as if it had not been insured. Does not this case become the same as that first put, namely, the case of the shipowner having insured freight but not ship?

It seems impossible to maintain that, upon a question of construction, the rights of either of the assured or underwriter on the freight policy can be altered by anything done or omitted to be done on the policy on ship. To hold otherwise is to mix up two independent contracts, and contracts between different parties. The excepted case above mentioned of the ship being repaired and earning freight on the voyage insured, is made to depend not on what is done under or by virtue of another contract, but on what is done to and by the ship. If the ship earns freight by reason of repairs recklessly or improvidently made, the same

(1) 1 Macq. Sc. Ap. 328, 334.

result follows whether the ship was insured or not. In determining, then, the construction of the policy on freight as to liabilities and rights under it, it must be immaterial whether the assured on a policy on the ship has lost or made perfect his right to recover on that policy for a constructive total loss of ship, by failing to give, or giving, due notice of abandonment under that policy.

The only question is, whether there is any implied contract or condition in the policy on freight, under any of the states of circumstances above-mentioned where there is any loss of freight, imposing upon the assured under that policy the obligation of giving notice of abandonment to the underwriter of that policy. And it was to meet this question that the arguments were propounded at the Bar with regard to the reason for giving notice of abandonment. On the one side it will be found that the arguments were founded on the assertion that notice of abandonment need not be given where there is nothing to abandon, where there is not anything and no chance of anything which can pass or be of value to the abandonee. On the other side, the real point of the argument was that if the thing insured could be said to exist in specie, notice of abandonment of it must be given, although it could not pass to the abandonee, and he could not derive any value from it. This argument took the form of asserting that the notice is required in order to signify an election by the assured, or to give an opportunity for inquiry to the underwriter. The propositions thus enunciated on the two sides were treated by the Appellant's counsel as so contradictory the one of the other, so inconsistent, that if the one prevailed the other must fail. It may, however, be that they are consistent, and that where there is anything to abandon, the caution of great merchants and lawyers has, by usage, engrafted upon contracts of marine insurance the implied condition that notice of abandonment must be given, and given quickly, both in order to signify the election of the assured and to give the underwriter opportunity for inquiry and action, but that where there is nothing to abandon notice of abandonment, being futile, is unnecessary. The end to be obtained by abandonment would seem to be the preservation of the cardinal principle of marine insurance, the principle of indemnity, and to

1873
RANKIN
v.
POTTER.

that end to prevent the assured from having at the same time payment in full of the sum insured, and the thing insured, a thing of value, in his hands. It may be that it is as an incident of the rule, and in order to secure its application, that the assured, where he must abandon in order to recover the full sum insured, must give quick notice of his intention to abandon.

But whatever may be the reason of the rule as to the time for giving notice of abandonment, it is, and must be, inapplicable where no abandonment need be made. The question therefore really is, whether there must be abandonment in order to enable an assured to recover as for a total loss when there is nothing to abandon. If there is such a necessity, it arises upon a condition to be implied. It seems to me to be a proposition without foundation of reason to say that there must be an abandonment where there is nothing to abandon. If the case of *Knight* v. *Faith* (1) decided the contrary, I, with deference, think it is a wrong decision. The view of the Court of Common Pleas in *Farnworth* v. *Hyde* (2), not overruled as to this point in the Court of Error, seems to me to be correct. I venture to affirm that it is a correct proposition of insurance law to say that no abandonment is necessary, and no notice of abandonment is required where there is nothing to abandon which can pass to or be of value to the underwriter. It follows that on a policy on freight in general terms there need be no abandonment of freight, and no notice of abandonment is required, where the ship is damaged to such an extent or under such circumstances as would authorize an abandonment of the ship on a policy on the ship, and where there is no cargo on board the ship, or if on board, where none is saved with the chance of an opportunity of its being forwarded in a substituted ship. In the several states of circumstances above set forth and considered, the loss of freight on the policy on freight would be an actual total loss. This conclusion does not, as it seems to me, go the length of determining that there never can be a constructive total loss of freight. If, for instance, the ship should be damaged as described, but cargo which was on board has been saved under circumstances which leave it doubtful whether such cargo might or

(1) 15 Q. B. 649.

(2) 18 C. B. (N. S.) 835; 34 L. J. (C. P.) 207; on appeal, Law Rep. 2 C. P. 204.

11 Jur. N.S. 349 12 Jur. N.S. 997, 362, 933

might not be forwarded in a substituted ship, or if the original cargo should be lost and the ship may or may not probably earn some freight by carrying other goods on the voyage insured, it may be, and I think the rule is, that in order to make certain his right to recover as for a total loss on the policy on freight, the assured should give notice of abandonment of the chance of earning such substituted freight.

Another form of policy on freight, not unusual, but not so frequent as a policy on freight in general terms, is a policy insuring "chartered freight." In such policies the voyage insured commences usually at or from the port of sailing on the voyage described in the charterparty, or on or at the commencement of the voyage the ship must make to reach that port; but in both cases the voyage insured usually covers also the whole voyage to be sailed under the charterparty. Such a policy attaches earlier than a policy on freight in general terms; it attaches before any goods are on board the ship. If the ship be lost or damaged, or the cargo lost after the goods are on board, the same circumstances must arise and the same considerations apply as have been related and treated of in the case of a policy on freight in general terms. Before any goods are shipped the loss can occur solely by reason of damage to the ship; but if the ship be then actually totally lost, or so damaged as to be possibly a constructive total loss, so much of the above reasoning as is applicable to a loss by damage to the ship seems to be equally if not more cogent to shew that no part of the charter freight could possibly be earned by the assured, that there would be no freight or chance of freight to be abandoned, and therefore that no abandonment or notice of abandonment would be necessary; but that the loss of the chartered freight would be an actual total loss under the policy on freight.

These considerations, and this inquiry into the rules applicable to ordinary policies on freight, seem to me to determine what must be the decision on this unusual policy on freight under the circumstances which have happened. The questions raised are, whether there is any loss of freight by a peril insured against, and if so, is that loss a total loss? The ship was damaged during the voyage insured; it was damaged by a peril insured against. Unless the damages to the ship should be wholly, or sufficiently,

1873
RANKIN
v.
POTTER.

repaired, the insured freight could not be earned. If the damage to the ship could not be sufficiently repaired to enable the assured to earn the charter freight by carrying goods on board that ship, it seems to me that the damage to the ship caused by a peril insured against, during the voyage insured, is the cause of the loss of the earning the chartered freight by that ship. Loss of freight by reason of such damage to the ship caused by such a peril, is a loss against which, according to the interpretation put upon the policy at the commencement of this opinion, the underwriter on this policy on freight has, in terms, agreed to indemnify the assured. The question therefore is, whether the ship could have been sufficiently repaired to enable the assured to earn the chartered freight. Physically or mechanically it could. But as matter of business, carried on according to the dictates of sense, it could not. The true meaning of the 24th paragraph of the case is that a prudent owner of this ship, that is to say, an owner conducting himself according to the dictates of common sense in business, would not repair the ship. In such case the law holds that within the meaning of such a policy as this, the ship could not be repaired so as to earn the freight or any part of it by the use of that ship. The assured not being able to tender that ship, and having none of the goods in his possession, had no claim to carry any goods under the charterparty in a substituted ship.

8 C.P. 584

Without therefore relying upon the other impediment and prevention obviously in the way of the Plaintiff's earning the charterparty freight, namely, the certainty from the extent of damage that the ship could not be repaired so as to be seaworthy within any time during which the charterer would be bound to wait, it seems to me that the other facts which I have mentioned shew conclusively that there was a loss of freight by reason of damage to the ship caused by sea peril, happening during the voyage insured; and that such loss of freight is, upon the construction put upon the policy at the commencement of this opinion, a loss by a peril insured against; and that inasmuch as without repairing the ship, which the assured did not do, and was not bound to do, because in consideration of law it could not be done, no part of the chartered freight could be earned by any one; and that there was therefore no part of the chartered freight, or any chance of

earning any part of it, which by a pretended abandonment could pass to or be of value to the underwriter on freight; and that consequently the loss of freight was an actual total loss without notice of abandonment.

If notice of abandonment had been necessary, the question whether in this case it was given in due time seems to me to be more doubtful. There was no reason in this case to doubt the accuracy of the information forwarded to the assured. The question therefore, as it seems to me, is whether at any time before the surveys made at *Calcutta* were received, the assured had information of damage to the ship of such a nature and to such an extent as rendered the prospect of a total loss of the chartered freight imminent but not certain. If he had he was bound to give notice at once. If the case had been on trial before a jury I should say that the jurors should have been asked to find whether at any time there was laid before the assured information so certain and of such a nature as would lead an assured of ordinary care and intelligence to conclude that there was great danger of a total loss of the chartered freight, and only a chance of such loss being obviated, and that they should have been directed that, if such information was at any time conveyed to the assured, he was bound immediately to give notice of abandonment.

As in this case the Court was to draw inferences of fact, the question is, whether before the surveys made at *Calcutta* were received, the assured had information of damage to the ship of such a nature and to such an extent as I have described. The information upon these points which the assured had received were the surveys made at *Bluff Harbour* and at *Port Chalmers*. As to the first, made on the 27th of May, 1863, I think it was of no importance. The survey of the 10th of July, 1863, made at *Port Chalmers*, does seem to me to disclose formidable damage to the ship. If it had stood alone I should have been inclined to think that it disclosed such damage as ought to have so greatly alarmed the assured as that he ought to have acted upon it by giving immediate notice of abandonment. But it seems to me that the surveys of the 25th of August, 1863, and of the 4th of September, 1863, received about the same time, would modify the view to be derived from the former survey, and would lead the assured to

1873
RANKIN
v.
POTTER.

believe that the ship could proceed to *Calcutta*, and be repaired to such an extent, and within such a time, as would enable him to earn the chartered freight. I therefore come to the conclusion, though with some doubt, that there was no information before the arrival of the surveys made at *Calcutta* which made it incumbent on the assured to give notice of abandonment, assuming notice at some time to be necessary, and that, upon the same assumption, the notice given upon the receipt of the *Calcutta* surveys was given in due time.

If no notice was necessary, if there was an actual total loss, I cannot think that the right of the assured to payment of a total loss can be affected by a delay in demanding such payment. Delay in giving notice of a total loss seems to me to amount to no more than delay in asking for the settlement of it. I know of no obligation in insurance law to give immediate notice of an actual total loss. Immediate notice would not enable the underwriter to make the loss in any way less.

I therefore answer your Lordships' questions thus: As to the first, there was a loss by the perils insured against during the term of the policy. As to the second, no notice of abandonment either of ship or freight was necessary. As to the third, if notice of abandonment was necessary, it was given in time. As to the fourth, that in the case supposed, want of due notice as to the ship would not affect the rights of the Plaintiffs upon the policy on freight. As to the fifth, there was no such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight. As to the sixth, that the judgment ought to be for the Respondents.

MR. JUSTICE MELLOR:—

My Lords, I answer all the questions proposed by your Lordships to the Judges who attended during the argument in this case in favour of the Plaintiffs below, the Respondents in your Lordships' House.

In answer to the first question, I am of opinion that there was a loss of the subject matter of insurance by the perils insured against during the term of the policy.

In answer to the second question, I am of opinion that no notice

of abandonment either of the ship or freight was necessary under the circumstances to enable the Plaintiffs to recover for a total loss on the policy on freight.

In answer to the third question, I am of opinion, although with some hesitation, that if notice of abandonment was necessary, it was under the circumstances given in time.

To the fourth question, I answer that in my opinion if notice of abandonment of the ship was necessary in order to make a constructive total loss of the ship, and such notice was not given in time, the want of due notice as to the ship does not affect the right of the Plaintiffs upon the policy on freight.

To the fifth question, I answer that in my opinion there was no such conduct on the part of the assured, after the time of the alleged constructive loss of the ship, as discharged the underwriters from their liability upon the policy on freight.

To the sixth question, I am of opinion that the judgment ought to be for the Respondents.

In order to arrive at a right conclusion in this case, it is most essential accurately to ascertain the subject-matter insured by the policy in question, and against what perils it was agreed by the underwriters to insure; and to keep absolutely distinct the considerations which alone affect the policy on the contemplated homeward freight from those considerations which would apply to an ordinary case of insurance of the ship; and I cannot help saying with great respect, that the error into which the Court of Common Pleas appears to me to have fallen has arisen from not keeping distinct the character of the Plaintiffs as owners of the ship from their character as insurers of an entirely distinct subject-matter of insurance, viz., the freight contemplated to be earned on the homeward voyage. [The learned Judge stated its provisions and those of the policy.]

The subject insured by the policy was assumed and treated in the argument at the Bar to be a valued sum of £4000 on homeward chartered freight valued at £5000, although the latter figure is not filled in the policy. It is to be observed that the nature of the interest insured is not an interest in anything actually existing and of which possession can be had, such as a ship or cargo, or freight of cargo on board, but it is the interest only in the right

1873
RANKIN
v.
POTTER.

to have a cargo provided by the charterer at *Calcutta* on the condition that the ship, when it arrived there, should be tight, staunch, and strong, and every way fitted for the voyage home, notwithstanding any perils of seas which might happen to the ship on the voyage to *New Zealand*, and for thirty days in port there after arrival. In other words, it is a warranty that no "peril of the seas" which might happen to the ship on the voyage to *New Zealand*, and for thirty days in port there after arrival, should prevent the ship from arriving at *Calcutta*, and from being there tight, staunch, and strong, and every way fitted for the voyage home, with the cargo there stipulated to be loaded by the agent of the charterer; and the right to have such cargo loaded, and to earn the stipulated freight on the voyage home, and the interest in such right, is by the policy valued at the sum of £4000. The question really is, was the ship so damaged by perils of the seas during the period covered by that policy as to be practically disabled from arriving and being at *Calcutta* in such condition of seaworthiness as to entitle the owner to require from the charterers' agent the loading of the stipulated cargo?

In the judgment of the Court of Common Pleas it is said that "the case of insurance of specific charter freight to be carried upon a future voyage against perils to be incurred in the present one, is, so far as we can learn, exceptional in practice, though not unprecedented." And I cannot forbear to add that I think it to be an eminently inconvenient and unsatisfactory course of insurance. The subject matter of the insurance under the policy in question appears to me to be accurately appreciated and stated by the Court of Common Pleas (1), but I think that the foundation of the error into which, as it appears to me, the Court fell, is to be found in the following passage of the judgment: "The insurance of a subject thus dependent upon the possession of the ship, though not properly an accessory thereto, nor incident to the voyage insured, yet being insured by the ordinary form of policy, *ought to be dealt with upon the same principles as an insurance of the ship itself*, and as subject to the *same conditions in respect of abandonment and otherwise*, unless so far as the character of the subject-matter rendered abandonment idle or inapplicable."

(1) Law Rep. 3 C. P. 567-8.

1873
RANKIN
v.
POTTER.

I have already stated that in my opinion the true effect of the policy under consideration was to insure the ability of the ship to earn the freight contemplated by the charterparty, upon the cargo to be loaded at *Calcutta* for the homeward voyage, against perils to be encountered by the ship on the voyage to *New Zealand*, and for thirty days in port there after arrival, so that the ship should not be prevented from getting to *Calcutta* in such a state of seaworthiness as to give the owners a right of action against *De Mattos*, if he did not load the cargo pursuant to the charterparty.

The condition of the ship when at *New Zealand*, as regarded the sea damage which it sustained there during the time covered by the policy, was such, as it is admitted, would have justified an abandonment and claim for a constructive total loss. That being so, it now becomes important to consider whether the right to earn the freight under the charterparty was, and to what extent, affected by the actual condition of the ship at *New Zealand*. Baron *Cleasby* is reported to have said in the Court of Exchequer Chamber (1), that the thing insured "is the right to earn the freight, and this is neither destroyed nor irretrievably lost because the ship is damaged to the extent alleged. The condition of earning it, namely, repairing the vessel, is not made impossible, but expensive, and therefore difficult of performance, but these expenses and the difficulty form the equivalent in such case to damage to the thing, where the thing exists in specie, and mere damage to any extent does not constitute total loss." With great respect this appears to me to confound the considerations which arise upon two distinct contracts, viz., that of an ordinary policy on the ship, and a policy confined to the right and ability of the ship to earn the stipulated freight. The ship was, in fact, in such condition at *New Zealand* from sea damage, that no uninsured owner of ordinary prudence would have repaired it, and so far as he was concerned, had he known the actual facts, he would have been justified in at once abandoning it to the underwriters.

So soon as the ship became so sea damaged that no prudent uninsured owner would repair it, I think that from that moment its capacity to earn the stipulated freight on the homeward voyage had become a practical impossibility, so that it could not be

(1) Law Rep. 5 C. P. 356.

1873
RANKIN
v.
POTTER.

effectually tendered to the agent of the freighter at *Calcutta* as a ship "tight, staunch, and strong, and every way fitted for the voyage," that is the homeward voyage. It must be taken for granted that if the actual extent of the damage had been ascertained at *New Zealand*, the owner would then have done what he did at *Calcutta*, namely, abandon the ship to the underwriters; but the doing that, or the not doing it, either at *New Zealand* or *Calcutta*, could not, and does not, as I think, assist in determining whether, in fact, by reason of perils of seas during the time covered by the policy, the ship had become incapable of earning the contemplated freight, pursuant to the charterparty. I accept the dilemma proposed in the judgment of the Court of Common Pleas (1), that "the assured must answer that the total loss was complete, actual, and absolute, without abandonment at *Bluff Harbour*, immediately upon the happening of the damage, to repair which, would cost more than the value of the vessel, and if that were so, the subsequent proceedings of the owner were immaterial, inasmuch as no freight, properly so called, was in fact subsequently earned."

I think that my Brother *Lush* was right in the opinion he expressed in the Court of Exchequer Chamber (2), namely, "That which in the language of maritime commerce constitutes a loss of a ship, is damage to an extent which renders the ship not worth repairing, followed by a determination not to repair. As respects her capacity to earn freight, a ship in such condition is as much lost to the owner as if it had sunk or broken up."

It is true that the ship was taken to *Calcutta* under the charterparty as an existing ship, such as was supposed capable of being repaired at a cost which might reasonably be incurred in order to enable it to prosecute the homeward voyage. But when the true condition of the ship was ascertained, and it was found to be damaged to an extent which justified the owners in abandoning it to the underwriters, as a constructive total loss, and they did abandon it, the inference arising from those facts is entirely rebutted. I do not feel it incumbent on me to do more than to say, that whatever was then done or omitted to be done with a view to abandonment by the Plaintiffs as owners of the ship,

(1) Law Rep. 3 C. P. 568. (2) Law Rep. 5 C. P. 376.

has no real bearing upon the question to be determined in this case. If I am right in assuming that by reason of damage from perils of the sea, the ship had within the time covered by the policy become practically disabled from being tendered at *Calcutta* to the freighters' agent, as a ship answering the conditions of the charterparty, the subject-matter of insurance had become a total loss. There was nothing which the owners as the assured of the anticipated freight could do, or leave undone, which could affect the position or conduct of the underwriters in regard to the contract contained in the policy on freight.

To say that the Plaintiffs as the assured of the freight were in fact identified with the owners of the ship, and were therefore bound to act, or not to act, to elect, or not to elect, in conformity with the proceedings of the Plaintiffs as owners of the ship, is to confound the rights and obligations of the parties under two separate and distinct contracts. It does not appear from the case whether there was an insurance on the ship, though I collect from the judgment in *Potter* v. *Campbell* (1), that there was such a policy on the ship covering the voyage to *New Zealand;* but I am entitled, in considering the effect of the policy in question, to treat the ship as uninsured, and to deal singly with the loss of the anticipated freight. The right to call upon *De Mattos* to load a cargo at *Calcutta* had been rendered abortive by perils of the seas, resulting in such damage to the ship at *New Zealand* as rendered it practically impossible to make an effectual tender of the ship to receive cargo at *Calcutta.* What was then in the power of the assured under this policy to do or say to the underwriters which would not have been an idle ceremony?

The Plaintiffs in their character of owners of the ship had a duty to elect and give to the insurers on ship notice of abandonment within a reasonable time after the discovery of the true state of the facts, and it may be that they were guilty of such laches in delay in the discovery as rendered their notice of abandonment when given inoperative; but I am at a loss to see how that affects them under the policy in question. Their election was made for them when the condition of the ship, owing to perils insured against, became such as practically destroyed its capacity

(1) 16 W. R. 399. Printed papers in the case, 165.

1873
RANKIN
v.
POTTER.

to earn the contemplated freight. The ground upon which a notice of abandonment is held not to be necessary, where a ship founders at sea, and an actual total loss takes place, is, that there is nothing left which the assured can cede to the underwriters, or by which their position can be affected, and it appears to me that the reasoning of Lord *Abinger*, in delivering the judgment of the Exchequer Chamber in *Roux* v. *Salvador* (1), applies strictly to the circumstances of the present case. Had it not been for the respect which I feel for the opinions of the Judges, who, expressing the same view which I entertain of the subject-matter of insurance under the policy in question, have come to a different conclusion, I should have been content to state my opinion to be in conformity with the judgments of the Lord Chief Justice *Cockburn* and my Brother *Lush* in the Court of Exchequer Chamber.

Entertaining a very strong opinion that no notice of abandonment was necessary, I feel some difficulty in dealing with the question whether if a notice of abandonment was necessary it was given in time. In considering this question as applicable to the policy on freight simply, it appears to me that questions of fact quite distinct from those which would affect the policy on the ship may arise, and it may well be that what is a reasonable notice in the one case is not reasonable in the other; but I cannot fix any precise time, under the circumstances of the present case, from which, if a notice was necessary to be given, it would be or not be in time, as a matter of reasonableness. If it is to depend upon the diligence with which the owner pursues the inquiry into the actual condition of the ship arising from sea peril, I do not discover in the facts stated any such laches or neglect, or any such conduct on the part of the master in his dealing with the ship until the extent of the damage was fully discovered, as would induce me to differ from the opinion expressed by the majority of the Judges in the Exchequer Chamber.

Before concluding, I ought not to omit to notice a point that was made in the argument, and which I believe is adopted by one of my learned brothers for whose opinion I entertain the greatest respect, namely, that the insolvency of *De Mattos*, and not the perils of the seas, was the proximate cause of the loss of the

(1) 3 Bing. N. C. 278.

anticipated freight, and farther, that the delay in the ship's arrival at *Calcutta* had discharged *De Mattos*, even if solvent, from loading a cargo under the terms of the charterparty. I cannot help thinking that this view of the case arises from not keeping strictly in mind the subject-matter of insurance under the policy. If the matter insured was the right and ability of the ship to earn the home-freight by being at *Calcutta*, tight, staunch, and strong, and every way fitted for the voyage home, and that such state of the ship was a condition precedent to the right to require the loading of a cargo at *Calcutta* by the agent of *De Mattos*, the ship neither did nor could fulfil that condition, owing to the perils of the seas during the time covered by the policy, and that I think was a loss insured against independently of the solvency or insolvency of *De Mattos*.

It was farther said that the fact of the insolvency of *De Mattos* would have equally prevented his agent from providing a cargo, even if the ship had arrived at *Calcutta* in seaworthy condition. Had the policy not been a valued policy, that fact might have seriously affected the damages, but I do not see how it can afford an answer to the present action.

Then with regard to *De Mattos* being discharged from the obligation to load a cargo in consequence of the delay which had taken place in the arrival of the ship, that can be no answer to the action, if I am right in attributing that delay to the effect of sea damage within the policy.

I have therefore come to the conclusion that all the questions propounded by your Lordships to the Judges ought to be answered in favour of the Plaintiffs below who are the Respondents in your Lordships' House.

MR. JUSTICE BLACKBURN:—

My Lords, your Lordships have in this case proposed six questions to the Judges, all of which I answer in favour of the Plaintiffs in the cause, who are the Respondents in your Lordships' House. With your Lordships' permission I will first state generally my reasons for deciding in favour of the Plaintiffs on the merits. [The learned Judge here gave a summary of the charterparty and policy.]

It is to be observed on this charterparty that it is a condition

1873
RANKIN
v.
POTTER.

precedent to the earning of the freight that the *Sir William Eyre* should be, in due time, at *Calcutta*, and there seaworthy for the voyage from *Calcutta* to *Liverpool* or *London*. The Plaintiffs could not substitute any other vessel for it, and that being so, the Plaintiffs might be prevented from earning that freight by any disaster which befel this particular ship on its voyage out to *New Zealand*, or during its stay there, or on the voyage thence to *Calcutta*, or during its stay there, if the effect of that disaster was to render it impracticable to tender the ship at *Calcutta* in due time, and in a seaworthy condition for the voyage home round the *Cape of Good Hope*; but that they had a vested expectation of earning this freight, if no such disaster happened. They had therefore in respect of this freight an insurable interest during the whole of the outward voyage. This is not, as I understand, disputed; but if authority is required for it, I would refer your Lordships to *Barber* v. *Fleming* (1) and *Foley* v. *United Marine Insurance Company* (2). Being so situated they entered into the policy. In my opinion, the whole merits in this case depend upon the accurate understanding of the contract contained in this policy.

I must first observe on a matter which is perhaps not strictly before your Lordships. It is stated that this insurance was for £4000 on freight valued at £5000, and throughout the argument, and in the judgments below, the policy was treated as a valued policy, and consequently no question was discussed as to the amount to be recovered, nor whether the insolvency of *De Mattos*, and the consequent diminution in value of the freight insured, affected that amount. In the policy itself, however, the space which, if this was the case, ought to have been filled up with £5000, is left blank, and the policy is in form an open one. It is possible that the policy is miscopied, but I think it more probable that it was drawn up in this form by mistake, and that the underwriters, either from a sense of honour or from knowing that the contract could be reformed in equity, have been content to act on the contract as it ought to have been drawn up. I presume your Lordships would not like to put any obstacle in the way of such a fair proceeding. I shall therefore make no farther remark on the amount to be recovered.

(1) Law Rep. 5 Q. B. 59. (2) Law Rep. 5 C. P. 155.

1873
RANKIN
v.
POTTER.

The insurance is "lost or not lost at and from *Clyde* to *Southland*, while there, and thence to *Otago, New Zealand*, and for thirty days in port there," upon the *Sir William Eyre*. And the subject matter is £4,000 on homeward chartered freight. I think that the meaning of this contract is that the underwriters are to indemnify the assured if by any of the perils insured against the *Sir William Eyre* is, during the voyage from the *Clyde* to *New Zealand*, or during thirty days after arrival there, so damaged that, in consequence thereof, the homeward chartered freight cannot be earned.

In the judgment in the Common Pleas in this case (1) it is said, "The policy under consideration thus differs from an ordinary insurance upon freight. First, in that it could not be affected by loss of cargo, because the freight insured was not for cargo in existence or appropriated during the risk; next, that it was not subject to general average either of ship or cargo, because the freight was not to be earned during the voyage insured, and, as a consequence, that the underwriter was not in any case to contribute to repairs of the ship, not even in respect of general average. And lastly, that as the freight rested in contract for the future employment of the ship only, it would not pass by bare abandonment to the underwriters upon ship, but would simply come to nothing upon such abandonment if justifiable, because the abandonment would be in effect an election by the owner to treat the charter as at an end by reason of the usual exception of sea perils in the charterparty, and he would not be bound to incur in favour of the underwriters on ship any new responsibility not connected with the voyage on which the ship was insured." So far I completely agree, and instead of repeating this in other words I adopt this language as my own, but in what follows in that judgment I do not agree.

I think that if there was damage to the ship, such that though it was physically possible to repair the ship, the expense would be so great that, according to the rule laid down in *Moss* v. *Smith* (2), it was unreasonable so to do; the owner might, as between him and the charterer, elect not to repair the ship, but to treat the charter as at an end by reason of the exception of the sea perils, and if, under such circumstances, the owner did not in fact repair,

(1) Law Rep. 3 C. P. 567. (2) 9 C. B. 104; 19 L. J. (C. P.) 225.

1873
RANKIN
v.
POTTER.

the freight was totally lost by the perils insured against, and not, as stated in the judgment in the Common Pleas, by the owner's default, for the owner was not bound to repair the ship. There would be no loss from the perils insured against, if the owner did in fact repair the ship, which, though not bound to do so, he had a right to do if he pleased.

If, indeed, there had been a partial loss or damage, such that the owner could reasonably repair the ship, he was bound to do so; and if in such a case he declined to do so, I should agree with the judgment in the Common Pleas, in saying that he would lose the freight by his own choice or default, and not by any peril insured against. But I think that where the damage is so great that the owner is not bound to repair the ship, if he declines to do so he would lose his freight, not by his own default, but by the perils insured against. This seems an elementary proposition, but as much of what I consider the error in the judgment of the Common Pleas arises from not bearing it in mind, I will proceed to state some authorities for it.

The principle is thus expressed in the judgment of the Queen's Bench in *Stringer* v. *English, &c. Insurance Company* (1): "The assured if he, by any means such as he could reasonably be expected to use, could have prevented the loss" (which was in that case by a sale in the Prize Court) "was bound to use them, and if the sale was directly occasioned by his default, though remotely by the perils insured against" (in that case a seizure) "he cannot recover against the underwriters. But the assured are not bound to use unreasonable exertions in order to preserve the thing insured; and if the giving of a bond or deposit of money" (in the present case the repairing of the ship) "would have exposed them to expense or risk of expense beyond the value of the object, or, as the same idea is often expressed, if the steps necessary to prevent the sale" (loss) "were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure."

I do not cite this as conclusive, for it is for your Lordships to determine whether it is correct or not, but as expressing what I think the true principle. So far as regards the case of a ship, it is

(1) Law Rep. 4 Q. B. 691.

1873
RANKIN
v.
POTTER.

very concisely and I think accurately expressed by the words of my brother *Lush*, as already quoted from his judgment in the Court below (1).

I must here observe that, in my opinion (which in this respect differs from that expressed in the judgment of the Court of Common Pleas below), there might well be a state of things in which the assured could recover on this policy for a total loss of the freight, though the assured could not, either with or without notice of abandonment, recover against the underwriters on ship for a total loss. The questions between the assured and the two sets of underwriters are not the same. The question between the assured and the underwriters on the ship is whether the damage sustained may be so far repaired as to keep it a ship, though not perhaps so good a ship as it was before, without expending on it more than it would be worth. The question between the assured and the underwriter on the chartered freight is, whether the damage can be so far repaired that the ship can be at *Calcutta*, seaworthy for a voyage round the *Cape of Good Hope*, without expending on it more than it would be worth. I should have added a farther term, that the repairs could be done so promptly that the ship might arrive at *Calcutta* within a reasonable time, as between the shipowner and *De Mattos*, were it not for the case of *Hurst* v. *Usborne* (2), which seems to me an authority against this position. And though I should not hesitate to advise your Lordships to reconsider that case if necessary, I think it is not necessary so to do in the present case.

My position therefore is, that if the ship had been so damaged that it could be brought to *Calcutta*, and there made seaworthy for a voyage round the *Cape*, but not without expending, say £10,000, and would then, all things considered, be worth only £9,000, but that it could by an expenditure of £4,000 be made a ship quite fit for short voyages, though not for such a voyage as that round the *Cape*, and would then be worth, say £5000, there would be a total loss of the freight, though no total loss of the ship. No notice of abandonment whatever given to the underwriters on ship could have converted that which on those figures was only a partial loss

(1) Law Rep. 5 C. P. 376. (2) 18 C. B. 144; 25 L. J. (C. P.) 209.

1873
RANKIN
v.
POTTER.

into a total one. This was decided by the Exchequer Chamber in *Kemp* v. *Halliday* (1), a case which was not cited at your Lordships' Bar, but to which I venture to refer your Lordships, as the passages contained in pages 749 to 754 of the report will shew your Lordships that the opinions I now express are not formed for the first time.

I now proceed to consider the answer to your Lordships' first question. That, in my opinion, depends upon a question of fact, which I think is answered by the very important addition to the case made during the argument in the Exchequer Chamber, and now contained in the Case: "It is admitted that the sea damage which the ship sustained at *New Zealand* during the time covered by the policy would have justified an abandonment and claim for a constructive total loss." This can only mean that the damage to the ship was so great, that the ship could not be repaired without spending more than its worth, and consequently that the shipowner might justifiably elect not to repair.

I think that, under such circumstances, the shipowner had a right as against his underwriters on ship to come upon them for a total loss. But if he does so, then, on general principles of equity not at all peculiar to marine insurance, he who recovers on a contract of indemnity must and does by taking satisfaction from the person indemnifying him, cede all his right in respect of that for which he obtains indemnity. It was held, in *Mason* v. *Sainsbury* (2), that, the *Hand-in-Hand Insurance Company* having paid the Plaintiff for a loss under a fire policy, was entitled to recover in an action in his name against the hundred This cession or abandonment is a very different thing from a notice of abandonment, though the ambiguous word, "abandonment," often leads to confounding the two. There is no notice of abandonment in cases of fire insurance, but the salvage is transferred on the principle of equity, expressed by Lord *Hardwicke* in *Randal* v. *Cockran* (3), that "the person who originally sustains the loss was the owner, but, after satisfaction made to him, the insurer." In *Godsall* v. *Boldero* (4) the same principle was acted upon in a case of life

(1) 6 B. & S. 763.

(2) 3 Doug. Ed. by Rose (8vo.) 61; Marshall on Ins. 794.

(3) 1 Ves. 98.

(4) 9 East, 72.

insurance. That case was overruled in *Dalby* v. *The India and London Life Assurance Company* (1), because the principle was misapplied to a life insurance, which is not a contract of indemnity; but the principle itself has never (that I know of) been questioned.

When, therefore, the party indemnified has a right to indemnity, and has elected to enforce his claim, the chance of any benefit from an improvement in the value of what is in existence, and the risk of any loss from its deterioration, are transferred from the party indemnified to those who indemnify; and, therefore, if the state of things is such that steps may be taken to improve the value of what remains, or to preserve it from farther deterioration, such steps, from the moment of the election, concern the party indemnifying, who therefore ought to be informed promptly of the election to come upon him, in order that he may, if he pleases, take steps for his own protection. And on general principles of law (still not confined to marine insurance), an election, once determined, is determined for ever, and such a determination is made by any act that shews it to be made. And, therefore, anything that indicates that the party indemnified has determined to take to himself the chance of benefit from an increased value in the part saved, and only claim for the partial loss, will determine his election so to do. I may refer for an exposition of this general principle to the judgment of the Exchequer Chamber in *Clough* v. *London and North-Western Railway* (2).

In cases of marine insurance, the regular mercantile mode of letting the underwriters know that the assured mean to come upon them for a complete indemnity, is by giving notice of abandonment, which is a very different thing from the abandonment or cession itself. This notice when given is conclusive, that the assured, if still in a situation to determine his election, has determined to come upon the underwriters for a total loss, the consequence of which is that everything is ceded (to avoid the use of the ambiguous word "abandoned") to the underwriters. Chief Justice *Abbott*, in *Cologan* v. *London Assurance* (3), says, "I do not consider an abandonment as having the effect of converting a partial into a total loss." . . . . "The abandonment, however,

(1) 15 C.B. 365; 24 L.J. (C.P.) 2. (2) Law Rep. 7 Ex. 34–35.
(3) 5 M. & S. 456.

[1873
RANKIN
v.
POTTER.

excludes any presumption which might have arisen from the silence of the assured that they still meant to adhere to the adventure as their own."

If before giving this notice the assured have already indicated by their acts, or if the circumstances are such that they indicate by their silence, that they have elected to adhere to the adventure as their own, the notice of abandonment obviously comes too late. A very good example of such a case is afforded by *Mitchell* v. *Edie* (1), as explained in *Roux* v. *Salvador* (2). There a ship laden with sugar, and bound for *London*, was captured and finally taken into *Charlestown*, where the sugar was sold and the proceeds lodged in the hands of a person resident in *Charlestown*. From the state of political affairs at that time, sugar was dear at *Charlestown*, and, as Lord *Abinger* conjectured, the sugar had come to a very good market, and the assured was satisfied, and took to the proceeds. A year afterwards, the person in whose hands the money was, became insolvent, and after that it was, with obvious justice, held that it was too late to come upon the underwriters for a total loss. Thus explained, the case is a good example of the principle stated in *Stringer* v. *England, &c., Insurance Company* (3), where it is said, "As is well pointed out in 2 *Phillips*, Insurance, s. 1669, where the cargo still subsists in specie, and may be recovered, the question depending on abandonment is, which party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insured. To allow the assured to change his election whilst the circumstances remain the same, would enable the assured to treat the property as his, so long as there was a prospect of profit from the rise in the market, and as the property of the insurers, so soon as there was a certainty of loss, which would be inequitable: *qui commodum sentit sentire debet et onus.*"

I should apologize to your Lordships for dwelling so long on what seems to me the principle on which abandonment, and the necessity of notice of abandonment, when required, depend, had it not been argued at your Lordships' Bar, on the authority of

(1) 1 T. R. 608. (2) 3 Bing. N. C. 266.
(3) Law Rep. 4 Q. B. 688.

Knight v. *Faith* (1), that there is a technical rule of insurance law by which notice of abandonment must be given if the thing exists in specie at all, though the state of things is such that the underwriters could do nothing in consequence of the notice. I think it more convenient to postpone my remarks on that case till I answer your Lordships' last question. In the meanwhile I proceed to say that I should be very sorry to throw any doubt on the principle expressed by Lord *Abinger* in the following passage in his judgment in *Roux* v. *Salvador* (2), where, after stating the state of circumstances which give the insured a right to treat the case as one of total loss, he proceeds, "But if he elects to do this, as the thing insured, or a portion of it, still exists and is vested in him, the very principle of indemnity that he should make a cession of all his right to the recovery of it, and that, too, within a reasonable time after he receives intelligence of the accident, that the underwriter may be entitled to all the benefit of what may still be of any value, and that he may, if he pleases, take measures, at his own cost, for realising or increasing that value."

But I think this is from the nature of things confined to cases where there are some steps which the underwriters could take, if they had notice. When they can do so, I think that the neglect to give a notice of abandonment may determine the owner's election. This is a matter that is now of much greater practical importance than it was when Lord *Abinger* delivered that judgment. For then the assured could not learn that his ship had got into difficulties at a distant place till long after the disaster, and the underwriters could only send out orders which would arrive later still. Under such circumstances a notice of abandonment was often a very idle ceremony, and in my opinion unnecessary, if the facts did amount to a total loss, inoperative if they did not. Now, when by means of the electric telegraph the underwriters' orders might promptly reach the spot where the ship was in peril, a notice of abandonment may be of great practical importance. What would be a reasonable time, and whether the neglect to give notice of abandonment does determine the election, must, I think, depend in each case on the circumstances, and principally on what steps the underwriters might take if they had notice. If there

(1) 15 Q. B. 649. (2) 3 Bing. N. C. 286.

1873
RANKIN
v.
POTTER.

was nothing they could do, no notice I think is required. This I apprehend is the principle of *Cambridge* v. *Anderton* (1), *Roux* v. *Salvador* (2), and *Farnworth* v. *Hyde* (3). For, as has often been observed, a sale by the master is not one of the underwriters' perils, and is only material as shewing that there is no longer anything which can be done to save the thing sold for whom it may concern. It conclusively determines that neither assurers nor assured can do anything, and consequently that a notice of abanment would be but an idle form on which nothing could be done, and which therefore is unnecessary.

If these which I have submitted to your Lordships are the true principles on which the law depends, it seems to me to be obvious that in this case there was a total loss of the freight in consequence of the damage by sea perils being so great that the shipowner was not bound to repair the ship. No doubt the shipowner might have repaired it if he pleased, and if, as in *Benson* v. *Chapman* (4), he had elected to repair it, and had done so, though at a ruinous expense, the freight would not have been lost. But the ship in this case never was repaired so as to make it capable of earning the freight, and the insured was under no obligation to make the repairs at a ruinous cost.

This brings me to the second question. I cannot see how the contract between the Plaintiff and the Defendant, by which the latter undertakes to indemnify the former against the loss of the freight, can be in any way affected by the fact that the Plaintiff had made a contract with other persons by which they undertook to indemnify him against loss on the ship. If the facts are not such as to amount to a loss of freight from the perils insured against, no transaction between the Plaintiff and third persons could make them amount to such a loss. If they were such as to amount to a loss of the freight it can make no difference to the now Defendant whether the Plaintiff can or cannot recover for the damage to his ship from other persons. It is true that a transaction with third persons may, as evidence, prove that the Plaintiff had elected not to repair the ship, as the sale of the

(1) 2 B. & C. 691.
(2) 3 Bing. N. C. 266.
(3) 18 C. B. (N. S.) 835; 36 L. J. (C. P.) 33; Law Rep. 2 C. P. 204.
(4) 2 H. L. C. 696.

wreck in *Cambridge* v. *Anderton* (1), and in *Farnworth* v. *Hyde* (2), did. And so, if the Plaintiff in the present case had given notice of abandonment at once to the underwriters on ship, and recovered from them as for a total loss, it would have afforded conclusive evidence that he had elected not to repair the ship. As it was he delayed so long that I think the fair conclusion of fact is, that, as between him and the underwriters on ship, he had elected to take his chance of doing a better thing by keeping it as a ship to himself, and coming on the underwriters for a partial loss only.

I do not go into the facts, as the question whether the owner could have recovered as for a total loss on the policy on ship or not is only collaterally raised in this case, but in my opinion they completely bring the case within the principle stated by Lord Chancellor *Cottenham* in *Fleming* v. *Smith* (3), where he says, "They were sufficiently informed of what had taken place to enable them, if they thought proper, to take upon themselves the chance of the benefit of retaining the ownership of the property, instead of taking the sum which was secured to them by the policy effected with the underwriters on the vessel; and if they acted upon that opportunity of election they surely cannot afterwards turn round and go against the underwriters as for a total loss." I should, therefore, as at present advised, have concurred with the Court of Common Pleas in the decision in *Potter* v. *Campbell* (4). But I think that this in noways affects the question between the Plaintiffs and the underwriters on freight. I agree with what has been said by my Brother *Brett;* the Plaintiffs not having come upon the underwriters for ship leaves the case just as if the ship had never been insured at all.

This brings me to consider whether it was necessary for the Plaintiffs to give notice of abandonment to the underwriters on freight. It was argued at your Lordships' Bar that, by the law of marine insurance, a notice of abandonment was as imperatively necessary as a notice of dishonour is by the law merchant on bills of exchange. On this I shall submit some observations at the end of this opinion, but at present I will assume that the true prin-

(1) 2 B. & C. 691.
(2) 18 C. B. (N.S.) 835; 36 L. J. (C.P.) 33; Law Rep. 2 C. P. 204.
(3) 1 H. L. C. 513.
(4) 16 W. R. 399. Printed papers in the case, 165.

1873
RANKIN
v.
POTTER.

ciple is that notice of abandonment is only requisite when, from the state of facts, it may make a difference to the underwriters, if the assured delays making his election, whether he will adhere to the property, taking his chance of profit or loss from so doing, or come upon the underwriters for a total loss. If that be the principle, it seems to me to follow from it that, inasmuch as there was nothing which the underwriters on freight could have done to alter their position in consequence of a notice of abandonment, and that it would have been an idle ceremony, no notice could ever be required, and, not being required at all, could not be too late. These are the reasons for which I answer to your Lordships' second question by saying, that in my opinion no notice of abandonment either of ship or freight was necessary to enable the Plaintiffs to recover for a total loss on the policy on freight.

To the third question, that in my opinion no notice at all being required, it never could be out of time.

To the fourth question, that though I think that under the circumstances of this case the Plaintiffs have precluded themselves from recovering for a total loss of the ship, that in no way affects the rights of the Plaintiffs upon the policy on freight.

I now come to your Lordships' fifth question. From what I have already written your Lordships will perceive that in my opinion the decision of the case really should depend on the answer to this question. I have already indicated that I think that the assured so conducted themselves as to discharge the underwriters on ship from the liability for a total loss, for the assured took to themselves the chance of benefit from retaining the ship as their own, and so made their election as to the ship. But as to the freight, I can see nothing which could have been done by the underwriters if the idle ceremony of a notice had been gone through. It was indeed suggested that the underwriters on freight might have made some arrangements with the underwriters on ship, by which they were to repair the ship, send her on, and in the name of the owners tender her to *De Mattos*. But in all cases, and especially in cases of insurance, we look to what is practically possible, and not to remote theoretical imaginations. If it could be shewn that the delay in this case, which was certainly considerable, had in any way altered the position of the underwriters, if there

was anything which they could have done, if the claim had been made on them at the time when the disaster happened at *New Zealand*, or in the interval, which they cannot now do, or if any prejudice had been sustained by them in consequence of the delay, the case would be different. I should then have to consider whether the prejudice sustained was sufficient to give rise to a preclusion. But as the facts are, there is nothing of the sort. I therefore answer your Lordships' fifth question by saying that in my opinion there was no such conduct as to discharge the underwriters from their liability upon the policy on freight.

The answers to those five questions would answer the sixth and last, were it not that I have reserved to this time the discussion of the proposition argued at your Lordships' Bar, that there is a technical necessity for a notice of abandonment in a case of marine insurance, whether any use can be made of it or not, and whether the failure to give it works any prejudice or not. It was said it was required by the law merchant as to insurance, just as notice of dishonour is required by the law merchant on a bill of exchange.

Such is the law in some foreign countries, but I will submit to your Lordships my reasons for thinking that it is not and never was the law of *England*. *Emerigon*, in the first section of the 17th chapter of his celebrated Treatise on Insurance (1), states that by the general law merchant, or as he calls it "*le droit des nations*," there was no need for any notice of abandonment, the contract being one of indemnity only. I do not pretend to have made any research myself as to what was the ancient law merchant, but from *Emerigon's* high character for learning and research I assume that he is correct. He then proceeds to say that the law merchant did not prohibit persons from making a stipulation that under certain stipulated circumstances the subject-matter of the assurance might be abandoned to the underwriters, who then should pay the whole sum assured, without having any option merely to indemnify the assured. And he observes that doubtless the usual clauses to that effect gave rise to established rules on the subject. He then cites (p. 208) from *Casaregis'* three rules, which *Emerigon* seems to consider as truly stating the law merchant on the subject. They are as follows:—1. That abandonment is a formality which is sufficiently

(1) Vol. ii., Ed. by *Boulay Paty*, 1837, ch. xvii., s. 1, p. 207.

1873

RANKIN v. POTTER.

complied with by the simple fact that the assured demands from the assurers payment of the whole sum insured. 2. That the assured may, without having recourse to abandonment, recover the salvage, and claim payment from the assurers of an average loss only. 3. That in case of total loss abandonment is an idle form, "*le délaissement est une formalité inutile.*" The editor of *Emerigon* observes in a note that the first and third of those rules are not the law of *France* at this day. And *Emerigon* points out that all this was in *France* (and, in consequence, in those countries which have adopted the French law) altered by the positive enactments contained in the celebrated *Ordonnance de la Marine* of 1681, by the 46th article of which it was enacted that "No abandonment shall be made except in case of capture, shipwreck, '*bris*' 'breaking up,' stranding, arrest of princes, or total loss of the things assured, and that all other losses shall be deemed average losses only." On this *Emerigon* treats at great length in the following sections of the 17th chapter.

There seems to have been at first much controversy and dispute as to the true effect of the enactment, but it seems to have been finally settled in *France* that the assured could never recover for a total loss without abandonment, even though the thing assured was totally destroyed. "Such," says *Emerigon* (1), "is the enactment of our ordonnance, to which we must submit." And it was farther established that when any of the events specified in the 46th article had happened, the assured might by giving notice of abandonment recover for a total loss, though the thing insured was quite safe and uninjured. This *Emerigon* justifies, or at least accounts for, by saying that the ordonnance created a presumption, which was *juris et de jure*, that where any of the first five cases had happened the thing was lost. This was carried so far that where a ship was stranded and got off without injury either to itself or cargo, the owners of the cargo were permitted to give notice of abandonment and recover as for a total loss. This highly artificial conclusion was corrected by a supplemental ordonnance of 1779, but till then it remained the French law: *Emerigon* (2).

Now, the enactments of the French Law, contained in the ordinance of the Marine, can have no force in *England*, except in so

(1) Vol. ii., ch. xvii., s. 6, p. 232. (2) Vol. ii., s. 2, p. 212.

far as they have been adopted into our law. As far as regards the law that by giving notice of abandonment the assured can recover for a total loss, because by a presumption *juris et de jure* the property is to be taken as lost in law, though it is safe in fact, it certainly is not the law of *England*, and never was. In *Hamilton* v. *Mendes* (1), Lord *Mansfield* strongly laid down the doctrine that a policy of marine insurance is a contract of indemnity, and that "if the thing in truth was safe, no artificial reasoning shall be allowed to set up a total loss."

No one would for a moment now venture to contend that a notice of abandonment could in *England* entitle an assured to recover as for a total loss on a policy on goods if the ship was captured, though set free, or wrecked but the cargo saved uninjured, or in a case of simple stranding. So far the law of the Ordonnance is clearly not adopted in *England*. Even in the case where the loss is at the time of the notice of abandonment total, though capable of being reduced by a change of circumstances to a partial loss, the assured (unless in the very uncommon case of the notice being accepted) cannot recover as for a total loss if that change of circumstances does occur before the trial: *Dean* v. *Hornby* (2). Nor can it be for a moment contended that a notice of abandonment is essential to the assured's right to recover for a total loss where the loss is in fact total.

But though in no one of these cases has the French enactment been adopted in the English law, it is argued that it has been so adopted as in the case of what is called a constructive total loss, to render a notice of abandonment a necessary technical preliminary to an action for the total loss, though it is not required for any useful purpose, though no prejudice has been sustained for want of it, though the loss at the time of the trial still continues total, and though, according to *Casaregis*, as cited and approved of by *Emerigon*, the law merchant looked on the notice of abandonment in case of total loss as being "*une formalité inutile*."

It is unnecessary to refer to any English decisions prior to the great case of *Roux* v. *Salvador* (3). All the authorities bearing on the point were, I believe, cited and considered in the elaborate

(1) 2 Burr. 1198.
(2) 3 El. & Bl. 180.
(3) 1 Bing. N. C. 526; reversed in error, 3 Bing. N. C. 266.

1873

RANKIN v. POTTER.

judgments delivered in that case; and the decision of the Court of Exchequer Chamber was that no notice of abandonment was necessary, because, as is stated by Lord *Abinger* (1), "Neither the assured nor the underwriters could at the time when the intelligence arrived exercise any control over the goods, or by any interference alter the consequences."

It may be, however, convenient to refer your Lordships to the portion of Mr. *Phillips*' Treatise on Insurance in which he treats on this subject. I know of no text writer who treats the law of insurance with more learning, and certainly of none who treats it with as much sound sense and appreciation of the bearing of the doctrines laid down on practical business. It is, however, to be borne in mind that he writes in *America*, and that, as he clearly states (2), "It is a general rule in the *United States*, that if the ship or goods insured are damaged to more than half of the value by any peril insured against, or more than half the freight is lost, the assured may abandon and recover for a total loss." He adds, "This rule of abandonment on account of loss of over fifty per cent. of the value of the subject makes the most material difference between the American and English jurisprudence, relative to total loss and abandonment, and is to be kept in mind in examining the decisions of the tribunals of the two countries. This rule, and that rule in the *United States*, whereby the validity of the abandonment is tested by the circumstances existing at the time of making it, instead of the time of bringing the suit, as in *England*, give a wider range to constructive total loss and abandonment in the *United States*."

Bearing this distinction in mind, any one who wishes to understand this subject will derive great assistance from perusing the whole of Mr. *Phillips*' 17th chapter on total loss and abandonment. I will only refer your Lordships to sect. 1491, where he says, "An abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate." "When nothing remains to be assigned or transferred, an abandonment is useless and unnecessary." And to sect. 1494, where he observes, "But the better rule in such case is that if the insured neglects to abandon, he shall recover only according to the state of

(1) 3 Bing. N. C. 281. (2) 3rd Ed., vol. ii., s. 1536, p. 271.

things at the trial; since, as we shall see, under a declaration for a total loss he may recover for a partial loss, and the underwriter ought to have the advantage of whatever may occur to make the loss partial so long as the assured delays to elect a total loss. If he has judgment for a total loss, this is equivalent to an abandonment, and gives the underwriter a right to salvage." And to sect. 1497, where he says, "The distinction mentioned above as to recovering a total loss without abandonment is to be observed, viz., that the assured is charged with the proceeds in the adjustment of the loss as in a salvage loss, though the same may not have actually come to his hands. This circumstance being borne in mind will reconcile most of the decisions on this subject, which otherwise would appear to be directly contradictory, according to the language commonly used by the Courts, which must, however, be construed in reference to one or the other description of case under consideration." Your Lordships will appreciate the shrewdness of the latter part of this remark if you examine the various *dicta* cited in *Roux* v. *Salvador* (1) and *Knight* v. *Faith* (2).

To return to the English authorities, the decision of the Court of Exchequer Chamber in *Roux* v. *Salvador* (1) was, as far as I can learn, received with general approbation at the time. There was, however, one exception. Lord *Campbell* never could be brought to think it right. In the case of *Fleming* v. *Smith* (3) the counsel for the Appellants (the Attorney-General *Jervis*, and Sir *F. Thesiger*, argued, as I think logically, from the decision in *Roux* v. *Salvador* (1), that notice of abandonment could not be in any case required except where there was something which could be done by the underwriters in consequence; and then the failure to give notice of abandonment might be material as determining the election which the assured had, whether to treat the loss as total or not. This, as I have already stated to your Lordships, is what I consider to be the law. Lord *Campbell* was of a different opinion, and in his opinion says, "The law therefore requires that notice shall be given in order to convert a constructive into a total loss;" but though that was his opinion, it was not the judgment of the House of Lords. Lord *Cottenham*, Chancellor (and Lord *Brougham*

(1) 3 Bing. N. C. 266. (2) 15 Q. B. 649.
(3) 1 H. L. C. 513.

1873
RANKIN
v.
POTTER.

concurred in his opinion), carefully puts the decision exclusively on the ground that the assured had in fact elected to treat the loss as a partial loss only. This studied silence on his part may prevent us from saying that he differed from Lord *Campbell;* but he certainly did not express any concurrence with him.

After this in the Queen's Bench, when Lord *Campbell* was Chief Justice, there arose the case of *Knight* v. *Faith* (1). The manner in which that judgment came to be delivered was very peculiar. There was a very brief case stated for the opinion of the Court of Queen's Bench. On the statements in it the Court came to the conclusion, as stated in the judgment, that "slight repairs might have been sufficient again to fit the ship for navigation," and the Court said (2), that though the ship was sold, "we are of opinion that as against the insurers the sale is not shewn to be lawful." On such facts the assured could never have recovered for a total loss, even if he had delivered all possible notices of abandonment from the first to last. Yet the Court forced the counsel to amend the case by inserting a statement that no notice of abandonment was given, and pronounced an elaborate judgment on a point which it was wholly unnecessary to notice, except for the purpose of recording dissent from the decision of the Exchequer Chamber in *Roux* v. *Salvador* (3). It should in candour, however, be added that the other Judges of the Court joined Lord *Campbell* in this. Still I think that the fact that a judgment was not necessary for the decision of the case before the Court always diminishes its authority. And I think that, on perusing the judgment in *Knight* v. *Faith* (1), it will be found that no argument is produced which had not been used in *Roux* v. *Salvador* (3), and that no new authority is produced except Lord *Campbell's* own opinions in *Fleming* v. *Smith* (4), and a passage from the judgment of Lord Chancellor *Cottenham* in *Stewart* v. *The Greenock Marine Assurance* (5).

The question in that latter case was, what passed to the underwriters on ship, who were liable for a total loss of ship. They raised the very question alluded to in the section 1497 of *Phillips* already cited. The ship having been fatally injured just before it

(1) 15 Q. B. 649.
(2) Ibid. 657.
(3) 3 Bing. N. C. 266.
(4) 1 H. L. C. 513.
(5) 2 H. L. C. 159.

entered the docks, but kept together as a ship so that it entered the docks, delivered the cargo, and so earned freight, and the underwriters on ship said they were entitled as salvage to the freight thus earned after the disaster. This House decided that they were entitled to this benefit, on the precise principle long before laid down in *Randal* v. *Cockran* (1), and the other cases I referred to in the beginning of this opinion, that the Plaintiffs "claiming as upon a total loss, must give up to the underwriters all the remains of the property recovered, together with all the benefit and advantage belonging or incident to it." But I cannot see how, or in what way, the assertion of the doctrine that recovering for a total loss operates as a cession of everything, can be said to amount to the assertion of that other doctrine that the handing in of a notice of abandonment is a condition precedent to the right to claim for a total loss. And as it seems to me every *dictum* cited in *Knight* v. *Faith* (2) is capable of being reconciled with the judgment of the Exchequer Chamber in *Roux* v. *Salvador* (3) if it is only borne in mind that the abandonment or cession consequent on recovering for a total loss is one thing; the *notice* of abandonment, supposed to be a condition precedent to claiming for a total loss, is another. I have dwelt on this point at perhaps unnecessary length, for all that it is necessary to decide in this case is that where there is nothing to abandon no notice is requisite.

I have therefore to conclude by saying, in answer to your Lordships' last question, that in my opinion judgment ought to be for the Plaintiffs in the cause, the Respondents in your Lordships' House.

MR. BARON BRAMWELL:—

My Lords, in this case I think it convenient to consider (though it has been already done in the judgments delivered) the precise effect of the contract the Plaintiffs seek to enforce. The owners of the ship *Sir William Eyre* had entered into a charterparty with *De Mattos*, whereby the ship, then on a voyage to *New Zealand*, was to proceed to *Calcutta*, and there load a cargo for *Liverpool* or *London*, to be provided by him. The

(1) 1 Ves. 98. (2) 15 Q. B. 649.
(3) 3 Bing. N. C. 266.

1873

RANKIN v. POTTER.

contract in question is a policy of insurance by the owners (now represented by the Plaintiffs), whereby the underwriters insured against certain perils of the seas, which might happen on the voyage, then in progress, to *New Zealand*, preventing the owners from earning or being entitled to earn the charter freight. And the policy is to be taken to be a valued policy, and £4000 the value. The insurance did not extend to the voyage from *New Zealand* to *Calcutta*, the stay there, nor the voyage home. In effect, therefore, the insurance was against perils on the voyage to *New Zealand* which should prevent the ship getting to *Calcutta* in such a state as to give the owners a right of action against *De Mattos* if he did not load the cargo, and in such a state as should enable the vessel to bring the cargo home loaded, and earn the freight. For if *De Mattos* had loaded the cargo, and if, owing to perils covered by the policy (perhaps undiscovered at *Calcutta*), the vessel had failed to bring the chartered cargo home, I apprehend the underwriters would have been liable.

It seems to me, therefore, that on this policy there might have been a partial loss, with a partial or total loss of the ship. I am not speaking of what is probable, but it is possible, I suppose, that the ship might have been so injured on the outward voyage as to be unseaworthy for a whole cargo; it is possible that the charterer, though having a right to refuse to load an unseaworthy ship or a partial cargo, might have elected to do so. In each such case there might be a partial loss. And it is, I suppose, possible that a peril covered by the policy might have injured the ship in such a way that it became necessary to jettison a part of the cargo on the home voyage, and yet the rest might be carried home in the ship and freight earned. This also, I conceive, would be a partial loss, and without a total loss of the ship. So also, if by perils insured against the ship had been disabled from reaching *Calcutta* by an agreed time in the charter, or not in time to make the voyage the same as the charter provided for. I do not know that it is necessary to enter into these speculations, but to my mind they help to clear the matter.

It seems to me then that the insurance was that perils of the seas on the voyage to *New Zealand* should not destroy or prevent the right of action against *De Mattos*, to accrue on the ship's

arrival at *Calcutta*, and his refusal to load, and should not prevent the earning of the freight, if he performed his contract to load.

Whether such an insurance should be called an insurance on freight is only a question of words. But it is very important in most cases to use the right word. Certainly this insurance is practically more an insurance on ship in respect of freight than on the freight. For if the ship sustained no damage on the voyage to *New Zealand* from perils insured against, there could be no claim on the underwriters. This perhaps is true of all insurances on chartered freight till the cargo is loaded. For till then nothing that can happen to the cargo, or its carriage, can be in question. If Mr. Justice *Willes'* expression is accurate in this respect, this is wholly an insurance on the ship. He says, "The policy was in its nature therefore against total loss of freight by total loss of ship." Of course I do not mean that all the incidents of an ordinary insurance on ship attach, nor that none of those on freight does.

It seems to me that the statement of the case answers the first difficulty put on behalf of the Defendant, viz., that *De Mattos'* insolvency, or the destruction of the ship by the cyclone, was the cause of the Plaintiffs' loss of the freight. This is not so. For the perils on the outward voyage had put the ship into such a condition that the Plaintiffs had no right of action against *De Mattos* for not loading. They *thought* they had when the vessel arrived at *Calcutta*, and so probably did *De Mattos'* agents. But they thought so because they did not know the true state of the facts. Had they sued *De Mattos* he would have had an answer that the ship was not seaworthy. Nor could they have said in reply that they were ready to make it so within a reasonable time. For its state was such that on its being known to them they would not have been ready to do so. One of the losses therefore insured against, viz., inability to enforce the charter against *De Mattos*, accrued by reason of perils insured against. The assured would indeed probably, as the charter freight was higher than the market rate, have lost the benefit of the charter by reason of *De Mattos'* refusal or inability to load, even though they had not lost it through perils of the sea. But the loss would have been different. They might have recovered damages from him, or proved against his estate. No doubt they would not, in this way, have got

1873
RANKIN
v.
POTTER.

£4000, but they would have got something. I agree with the illustration of Mr. Justice *Willes*, of the house left out of repair, and subsequently burned down, and with that of Sir *George Honyman*, of an injury to a man's leg which a subsequent injury made it necessary to cut off. I think, therefore, there was a loss of the chartered freight by perils insured against, loss which accrued, and gave a vested cause of action when the ship was damaged by taking the ground at *New Zealand*.

Another difficulty made for the Defendants was, that as the ship remained in specie, and could have been repaired so as to carry the cargo and earn the freight, and the assured did not think fit to repair, but abandoned the ship to the underwriters on ship, therefore the freight was lost, not by perils of the sea, but by the voluntary act of the Plaintiffs. I think the answer to this is that it was not their voluntary act, but one to which they were practically compelled by the extent of the damage. If this argument is good, it must apply to every case of insurance on freight where the ship remains in specie. But this is not pretended.

I think, therefore, there was a loss of the thing, or one of the things insured, by perils insured against.

But the great question is, was there a total loss? I think this question ought to be, and is, unaffected by there having been an insurance on the ship. For suppose there had been none, then the ship, or its materials, would have belonged to the assured, who would have broken it up, or sold it to be broken up. In that case they would own the salvage of the ship, instead of the underwriters doing so. And indeed in this case the Court of Common Pleas held that the abandonment was ineffectual. There is no estoppel on that matter between the present parties, and the question there decided would have to be reconsidered in this case. But it seems to me immaterial whether the ship was insured or not, whether validly abandoned or not. In any case, if it was so damaged by the perils insured against that a prudent owner would not repair, the owners were rendered practically unable to enforce the charterparty against *De Mattos*, and so there would be a total loss of the chartered freight, actual or constructive. Now there was a damage or loss to such an extent. But the ship, though so injured, remained a ship, and could have been repaired so as to

earn the freight, though at a loss. The loss of the ship, therefore, though total, was what is called constructive, perhaps an unfortunate expression, but one for which I know no substitute. It was actually a total loss, the materials of the ship remaining in the form of a ship. In such a case if the materials cannot be kept together as a ship at an expense less than their value as a ship when so kept, plus their value as materials not so kept together, the vessel is totally lost, or rather the loss of the vessel is total. Whether what happened here should be called an actual or a constructive total loss seems to me very doubtful. I incline to think it was an actual total loss of the freight by a constructive total loss of the ship. The damage or loss to a ship may be absolutely or necessarily total, as where it is burned or sunk to a hopeless depth. It may also be total where it remains in specie afloat or ashore. In that case it is so, or not, at the option of the assured. He may, if he thinks fit, treat the loss as partial and repair the ship. It is obvious that except in cases of valued policies the question is comparatively unimportant. In the case of a valued policy the question may be much more important.

But in both sorts of policies where the ship remains in specie, afloat or ashore, though the loss is really total, though the ship is practically lost as a ship, and what remains are only the materials of a ship fastened together in the form of a ship, the option is with the assured to keep his ship or his salvage, and claim for a partial loss, or to claim for a total loss, giving up his interest in the ship or its materials to the underwriters. This is abandonment. It always supposes there is something to abandon, something to cede. If the ship is burned, or sunk to a hopeless depth, there is nothing to abandon. So if it is dashed to pieces on the shore there is no ship to abandon; by the destruction of the ship the loss of the ship is total, and the pieces as a consequence belong to the underwriter. What would be the law in the supposable case of the ship being rebuilt of the old materials, to whom it would belong, and what consequences would follow as to other matters, it is not necessary to consider. It is enough to say that where the thing exists, as it is called in specie, in such condition as to be capable of utilization as the thing insured, the assured to claim for a total loss must abandon; where it does not

1873
RANKIN
v.
POTTER.

so exist he need not. Surely this is equally true of goods and of every other subject of insurance. Now here there was absolutely nothing to abandon. To hold that it was necessary to abandon, or to give notice of abandonment, would be to hold, not that it was necessary to *do*, but to *say* something. For let what might be said, nothing would thereby be *done*, no possible effect could follow. I cannot find the notice of abandonment in the case, and I can hardly think what words could be used. If they were that all right to the freight was abandoned they would be idle words, for there was no such right, no right at all.

It is suggested that the underwriters might have chartered a ship and proposed to *De Mattos* to let them bring home the cargo. But the power to do this, and the possibility of their doing it, would not be anything, nor the consequences of anything abandoned to them. It would not be a right at all, much more a right acquired by abandonment. It might equally be done by them though there was no abandonment. But this is the utmost that can be suggested; as there was nothing to be done, as nothing could be abandoned, nothing, no right, I think it was not and could not be necessary for the assured to say they abandoned, nor consequently to give any notice thereof. I beg to refer to the judgments of Lord Chief Justice *Cockburn* and Mr. Justice *Lush* on this point, to which I cannot profitably add.

But it is argued that though no notice of abandonment may have been necessary, or possible, yet that the assured ought to have given notice that they elected to treat the loss as total. That is, that they elected not to repair the ship, and so qualify themselves to enforce the charter against *De Mattos*. I may observe in passing that I could not, acting as a juryman, find as a fact that they could have repaired the ship in time for it to be ready for the adventure for which *De Mattos* agreed to find the cargo; and indeed, as the case stands, I should think he might have refused on the ground that the ship was a year overdue. But on the question of giving notice of their election, if they were bound to do so, it must be by virtue of some general rule of law, or some rule of insurance law, some implied part of the contract of insurance. I know of no such rule, either of the general or particular law. I know of no rule which compels a person, having

an option, to give notice which way he exercises it, where the position of the other party would not be affected by the giving or withholding of notice, when his conduct would not be regulated thereby. On this point I refer to the judgment of Mr. Justice *Lush*.

The opinions in favour of the Defendants seem to me to be influenced by a fallacy, which may be thus expressed. The Plaintiffs, it is argued, are prosecuting the voyage or adventure till they give notice of abandonment of the ship; therefore they are prosecuting what would give them a right to the freight; therefore there could not be a total loss of freight at that time; and that time was long after the damage, and therefore the total loss was not then actual. In a sense this is true. But as soon as the ship is abandoned there is a total loss of freight, or rather that which was doubtful when the damage happened, is, by the abandonment of the ship, ascertained to be a total loss of the freight. Suppose instead of abandonment, and instead of destruction by the cyclone, the assured had themselves broken up the ship at *Calcutta*, would not the loss of freight then have been total? No doubt the cause of action would have accrued when the damage happened at *New Zealand*, and from that date the *Statute of Limitations* would run; but the character of the loss would be doubtful till the owners of the ship elected to treat the loss of ship as total. Suppose this had been a case of a sub-charter, viz., that the owner had chartered to the assured, who had sub-chartered to *De Mattos*. Whether in such case there would be a total loss of the sub-chartered freight would depend on whether the shipowners elected to treat the loss of the ship as total. So here, though the owners and the persons with whom *De Mattos* made his charter are the same, yet it is on their election as owners to treat the ship as totally lost or not that their total loss of freight as letters of the ship to charter depends. They fill two characters, owners and parties to the charter; on their election in the former character depends their loss in the latter. With great respect this seems to me the answer to the argument in the judgment of the Common Pleas. I think the judgment there for the Defendants arises from not adverting to this consideration. No doubt had the owner repaired the ship the loss of freight would not have been total,

1873
RANKIN
v.
POTTER.

supposing the repairs in time for the voyage for which *De Mattos* undertook to find a cargo, which, if it were in controversy, I could not find in the Plaintiff's favour. True it is also that for a long time the Plaintiffs thought they could and would repair, but when they found out they practically could not, and therefore would not, the loss of the freight, till then in doubt, became certain and fixed. On these grounds I think no notice of abandoning of the freight was necessary.

On the question of whether, if notice of abandonment was necessary, it was given in time, I feel this difficulty. Thinking none necessary, I have yet to say when it ought to have been given. Whether the assured used due diligence in the performance of a duty which did not exist? I come to the conclusion that if it was necessary to be given, it was not given in time. I agree with the reasoning of Mr. Justice *Willes* on this. It is a rule that where a man is put on informing himself, he is in the same position as though he had notice. I think that what had happened was enough to make the assured bound to inform themselves as to the extent of the damage. I think their delay in doing so was unreasonable, bearing in mind that the stay in *New Zealand* was attributable, in part at least, to their own misconduct in breaking the law. Farther, I incline to think the question raised by Mr. Justice *Willes* should (1) be answered unfavourably to the assured. I think that (as a matter of fact, not as a matter of law) the vessel should have been taken to *Sydney* to be examined: see *Gernon* v. *Royal Exchange Assurance Company* (2). On this part of the case I feel great doubt, arising from the complication of the facts and the conflict of opinions.

Dealing generally with the case, I cannot but think that much of the difficulty has arisen from the unusual nature of the policy and the peculiar circumstances of the loss, the delay, the insolvency of the charterer, and the subsequent destruction by the cyclone. For suppose the ship safe and arrived at *Calcutta*, the charterer ready to load, a policy on the freight extending to perils at and from *Calcutta*, and the day before the loading began the ship driven ashore by a storm, and so damaged as certainly and obviously not worth repair, in short, a constructive total loss, would

(1) Law Rep. 3 C. P. 562. (2) 6 Taunt. 383.

abandonment then have been necessary, and of what? There would have been, could have been, nothing to abandon. But that case does not in substance differ from the present. Suppose that instead of the vessel proceeding to *Calcutta* its state had been known in *New Zealand*, and that it was not worth repair, and suppose there had been no insurance on ship, but the owners had kept it there existing in form as a ship, but used as a coal hulk only, would there not have been a total loss of this freight, and would notice of abandonment have been necessary? It seems to me clearly not.

I answer your Lordships' questions as follows:—To the first, yes; the second, no; the third, no; the fourth, no; the fifth, no; the sixth, for the Respondents.

MR. BARON MARTIN:—

My Lords, I assure your Lordships that if I had merely consulted my own feeling I would rather not have delivered my opinion upon this case; but having read very carefully the judgments delivered in the Court of Common Pleas and in the Exchequer Chamber, and having arrived at the conclusion that the judgment of the Court of Common Pleas and that of my Brother *Cleasby* in the Exchequer Chamber are right, I think it my duty to state the reasons which have led me to that conclusion, especially as your Lordships will find yourselves obliged in determining this case to decide what is the effect of a constructive total loss of ship upon an insurance on freight. Under these circumstances your Lordships will excuse me for bringing before you my view, and the more so as it is not exactly that either of my brother *Cleasby* or of the Court of Common Pleas.

This is an action upon a policy of insurance on freight, and the main question arises upon a novel state of facts. Nothing similar, so far as I know, has been the subject of decision in a Court of Law:—[His Lordship here gave a statement of the facts of the charter and of the policy.]

The Plaintiffs, to succeed, must establish that the freight from *Calcutta* to *England* was lost by a peril which occurred on or before the 5th of August, 1863, when the last of the thirty days expired, and their contention is that the facts stated in the special case do

1873
RANKIN
v.
POTTER.

so. The material ones are these:—The ship arrived at *Southland* on the 23rd of April, 1863, and remained there until the 31st of July. Whilst there it sustained very considerable damage. Upon the 4th of July it arrived at *Otago*, and there discharged the remainder of the cargo, was surveyed whilst there, but there being no dry dock at the place, the extent of damage could not be ascertained. And I think it must be taken that the master acted *bonâ fide*, and believed that with some temporary repairs the ship would be capable of proceeding in ballast to *Calcutta*, and there made fit to carry the chartered cargo to *England* and earn the freight. The temporary repairs were not commenced until February, 1864, and the ship remained at *Otago* (*Port Chalmers*) until the 14th of April. The cause of the delay is thus stated in the 14th paragraph of the case: "The *Sir William Eyre* remained at *Port Chalmers* until the 14th of April, 1864, being prevented solely by want of funds from making the necessary preparation to proceed to *Calcutta*; the master had not sufficient funds to defray the ship's charges and disbursements, and the liabilities which had been incurred in *New Zealand*, and not being able to raise such funds in *New Zealand*, nor Messrs. *Dalgetty*, to whom the ship was consigned at *Otago*, being willing to advance him the money he required for the purposes aforesaid, he was obliged to wait until he had obtained a sufficient remittance from the Plaintiffs." Whilst the ship was there the master, in order that it might not be wholly unproductive, used it to store coal, and earned upwards of £700 for storage rent. On the 14th of April the ship sailed for *Calcutta*, and arrived there on the 7th of June. The master immediately went to the agents of *De Mattos*, and applied to them to carry out the charter. A copy of it had several months before been forwarded to them, but *De Mattos* had become insolvent in the December previous, and they had provided no cargo, and absolutely refused to provide any, or to have anything to do with the ship. The ship was afterwards put into a dry dock and surveyed. The surveys are set forth. On the 2nd of August, upon the receipt, in the *United Kingdom*, of the survey, dated the 8th of June, the Plaintiffs gave notice of abandonment of the ship to the underwriters on ship, and of freight to the Defendants, the underwriters on the freight. Neither were accepted. The ship in its damaged

state was of the value of £3000. On the 8th of October the ship was stranded in a cyclone and became a wreck. Paragraph 24 of the case is as follows:—"It is admitted that the sea damage which the ship sustained at *New Zealand* during the time covered by the policy was such as would have justified an abandonment and claim for a constructive total loss." There are some other statements in the case, but the above are the material ones.

Upon these facts it was contended, first, that there was a loss of the freight insured by perils of the sea at *New Zealand*, by reason of the damage sustained at *Southland* before the expiration of the thirty days. This contention, I think, cannot be sustained. The loss of the ship no doubt causes a loss of freight, but there are two kinds of losses of ship, actual and constructive, and so long as a ship exists in specie, and retains the character of a ship, and is dealt with as such, and is capable of being repaired, there is no actual loss; there may be the elements of an inchoate constructive total loss, but to make such a loss of ship there must be an abandonment: *Knight* v. *Faith* (1). The only case referred to in the judgment of the Exchequer Chamber upon this point was *Roux* v. *Salvador* (2). But it seems to me to have no bearing upon it. It was an insurance on hides from *Valparaiso* to *Bordeaux*. The ship sprung a leak, and put into *Rio;* the hides were found there to be in an incipient state of putrefaction, and it was certain that if they had been sent on to *Bordeaux* they would have lost the character of hides and become a mass of putrefaction before their arrival. The master of the ship sold them at *Rio*, and it was held to be not an average but a total loss, with benefit of salvage. I do not see how this case bears upon the present. This ship, after the expiration of the thirty days, existed in specie, was treated and dealt with as a ship, performed a two months' voyage from *New Zealand* to *Calcutta* without apparently exhibiting any symptom of weakness or damage, and was tendered by the master to *De Mattos'* agents there as a ship capable of being repaired and earning the insured freight, and was of the value of £3000. Under such circumstances I think there could not be a loss of freight by perils of the sea until the Plaintiffs had elected not to repair the ship and not prosecute the voyage from *Calcutta*.

(1) 15 Q. B. 649. (2) 3 Bing. N. C. 266.

1873
RANKIN
v.
POTTER.

Secondly, it was contended that there was a constructive total loss of the ship by the abandonment to the underwriters of the ship on the 2nd of August. The Court of Common Pleas in a case, *Potter* v. *Campbell* (1), which was an action upon a policy on the ship, adjudged that the abandonment was not in time, and that there was not a constructive total loss of ship.

I think this judgment right, and I understand all my learned brethren are of the same opinion. I also agree with them that the constructive total loss of ship and the validity of the abandonment are not the test of the Defendant's liability, and that the question is the same as if there had been no insurance on the ship at all. The main and substantial question is, Was the freight from *Calcutta* lost to the Plaintiffs by perils of the sea? In my opinion this is to be determined by the state of facts existing at the time the Plaintiffs elected not to repair and prosecute the voyage from *Calcutta* to *England*, and is in a great measure, if not entirely, a question of fact. When the policy was effected the subject insured was freight expected to be earned, and if the ship had been sunk or wrecked before the expiration of the thirty days (the 5th of August, 1863), the Defendants would have been liable, for the expected freight would have been lost proximately, indeed directly, by a peril of the sea. But the ship arrived at *Calcutta*, and assuming the liability of the Defendants to be then continuing, it seems to me that the ordinary rule as to insurance on freight applies, viz., there must have been cargo at *Calcutta* in order to earn it; if there was no cargo, it might be that the Plaintiffs might have had a cause of action against *De Mattos* for not providing it; but unless there was cargo the freight insured was lost to the Plaintiffs, not by the perils of the sea, but by the default of *De Mattos*. The ship arrived at *Calcutta* on the 7th of June, and was immediately tendered to *De Mattos*' agent, under the provision in the charterparty; but he had become insolvent in December previous, and the agent declared that he had no cargo for the ship, and would provide none, and did provide none. Therefore before the extent of damage was ascertained, and the election not to repair made, the earning of the freight had become hopeless, indeed impossible, and was in reality and truth lost to the Plaintiffs by a

(1) 16 W. R. 399. Printed papers in the case, 165.

W N (1867) 321.

cause wholly beside, and independent of, the perils of the sea. It seems to me a crucial test that if the ship had sustained no damage, and had arrived at *Calcutta* perfectly sound and seaworthy, the freight would have been equally lost to the Plaintiffs. In my opinion the utmost that can be said is, that if *De Mattos* had been willing to provide the cargo, and had had it to provide, there would have been a loss of the freight by reason of the damage to the ship at *New Zealand*. But this hypothetical loss is not a loss by perils of the sea for which underwriters are liable. It is a well-established and settled rule that the underwriter is liable for no loss which is not proximately caused by the perils insured against. The maxim, "*Causa proxima non remota spectatur*," is a fundamental principle of insurance law. The rule laid down by Lord *Ellenborough* in *Forbes* v. *Aspinall* (1) is, "that it is incumbent upon the assured, in order to recover on a policy on freight, to prove that unless the perils insured against had intervened the freight would have been earned." The facts stated in the special case disprove this, indeed prove the contrary.

It has hitherto been assumed that *De Mattos* was bound to supply a cargo at *Calcutta;* but it is quite clear that he was not, and that he was discharged from this obligation by the delay at *New Zealand*. In any action brought against him it would have been a material and traversable averment, that the ship had sailed and proceeded from *New Zealand* to *Calcutta* in a reasonable time, and this the delay at *New Zealand* would have disproved. *De Mattos* was in no way responsible for or concerned with this delay, and its existence would have been an answer to the action against him.

In my opinion, therefore, the freight was not lost by perils of the sea; the proximate and direct cause of its loss was the non-existence of cargo, and to bring the perils of the sea to bear upon it two things must have existed which do not; one that *De Mattos* was willing to provide cargo, although he was under no legal obligation to do so; the other that he had had it to provide.

For these reasons I think the underwriters are not liable. But a much more important question remains behind, viz., the application of the principle of constructive total loss of ship to insurance on freight. No case has been cited, and I believe none exists, in

(1) 13 East, 325.

1873
RANKIN
v.
POTTER.

which this has hitherto been done. The doctrine as regards ship was conclusively established by this House in 1847, in the case of *Irving* v. *Manning* (1). But it must be admitted by its warmest admirers, that its application coupled with valued policies has in many instances enabled shipowners to obtain and compelled underwriters to pay double the value of ships which the owners were desirous to get rid of.

For the purpose of this question it may be assumed that *De Mattos* had provided a cargo, and was ready and willing to load it. There are several definitions of constructive total loss, but that given by Chief Justice *Tindal* in *Roux* v. *Salvador* (2) is generally adopted, that where the damage to the ship is so great from the perils insured against, as the owner cannot put it in a state of repair necessary for pursuing the voyage insured, except at an expense greater than the value of the ship (when repaired), he is not bound to incur the expense, but is at liberty to abandon and treat the loss as a total loss and recover the whole amount. A constructive total loss of ship can therefore only be upon condition that the assured shall abandon the ship. Abandonment is of the essence of it, it is a different thing altogether from total loss with benefit of salvage, of which *Roux* v. *Salvador* (3) is an instance. The word "abandon" is one in ordinary and common use, and in its natural sense well understood; but there is not a word in the English language used in a more highly artificial and technical sense than the word "abandon;" in reference to constructive total loss, it is defined to be a cession or transfer of the ship from the owner to the underwriter, and of all his property and interest in it, with all the claims that may arise from its ownership, and all the profits that may arise from it, including the freight then being earned. Its operation is as effectually to transfer the property of the ship to the underwriter as a sale for valuable consideration, so that of necessity it vests in the underwriter a chattel of more or less value, as the case may be. In the numerous discussions which preceded the final establishment of the doctrine of constructive total loss, nothing was more strenuously urged in favour of it than that by abandonment the underwriter became the absolute owner of

(1) 1 H. L. C. 287. (2) 1 Bing. N. C. 526, 538.
(3) Id. and 3 Bing. N. C. 266.

the ship, a thing of value, capable of being repaired and earning freight, if the abandonee thought fit. A constructive total loss is grounded upon a calculation. In the present case the calculation would be, present value of the ship £3000, expense of repairs £7500, total £10,500; against value of the ship when repaired £5,264, freight which if repaired the ship would have earned, say £3500, total £8764. The valued freight was £4000. It would therefore be for the pecuniary interest of an uninsured owner of ship not to repair, and if insured to abandon the ship and claim for a total loss; but against this the underwriter would have the ship of the value of £3000. The present question is, in such case can the freight be truly said to be lost by perils of the sea? The assured has made a calculation upon certain items, one of which is this very freight, and satisfied himself that it is for his pecuniary interest to sacrifice it and make no attempt to earn it, and has by his own voluntary act transferred the ship, by which alone it could be earned, to a third person, and thus deprived himself of the possibility of earning it. The freight is lost, remotely it may be, in consequence of sea damage, or in other words the perils of the sea, but directly and proximately by the voluntary act of the assured himself. The perils of the sea may be "the *sine qua non*," but certainly they are not the "*causa causans*." Suppose the underwriter thought fit to repair the ship and earn the freight, as he has a right to do, the underwriter on freight would be free, the event would have happened the not happening of which by reason of certain perils creates his liability. And can it be that the right of the assured and the liability of the underwriter on freight depend upon the conduct of a third person a stranger to both, and over whom neither of them has any control?

But the point seems to me decided by the cases of *McCarthy* v. *Abel* (1) and the *Scottish Insurance Company* v. *Turner* (2) in this House. In *McCarthy* v. *Abel* an insurance had been effected on homeward freight from *Riga*. The greater part of the cargo had been loaded, but on the 7th of November, 1800, the ship was seized under a Russian embargo. On receipt of the intelligence the assured gave notice of abandonment to the underwriters on the ship and on freight, he having effected separate insurances with

(1) 5 East, 388. (2) 1 Macq. Sc. Ap. 328, 334.

1873
RANKIN
v.
POTTER.

different sets of underwriters. The embargo was taken off in May, 1801, and the ship arrived safely and earned freight. This freight belonged to the underwriter on ship by reason of the abandonment, and the assured brought an action against the underwriter on freight as for a total loss. The Court held it could not be recovered. Lord *Ellenborough* said it could not, for two reasons; first, that there had been no loss of freight at all, as in the event the freight had been earned; second, that if it could be considered in any other sense lost to the assured, it had become so by his own act in abandoning the ship to the underwriter thereon, with which, and its consequences, the underwriter on freight had nothing to do. The principle of the second reason of this judgment seems to me directly against the Plaintiffs' contention in the present case. I will hereafter refer to the *Scottish Insurance Company* v. *Turner* (1); for my own part I am at a loss to see why, if the contract of insurance of freight in the present case was of any value, it did not pass to the underwriter on ship by the abandonment, so that the Plaintiffs' interest in it was at an end before action brought; and it is not alleged that the action was brought or is now maintained for the benefit of the underwriter on ship.

But, secondly, suppose the ship was not insured, and that upon the above calculation it would have been for the pecuniary interest of the Plaintiffs not to repair but to abandon the charter-party and the voyage to *England*. He would then have the ship of the value of £3000. Can it be that he can secure this and at the same time compel the Defendants to pay him the freight as if the ship had become an actual wreck at *New Zealand?* There would be no obligation upon the Plaintiffs to sell the ship or break it up, and if, after they had received the sum claimed (£4000), they thought fit to repair it, there would then be a ship sailing the sea, and earning freight, which had by construction of law been totally lost. Nor is there any reason why, by application of the same principle, the ship might not be totally lost half a dozen times over with the same result?

But it is said the Plaintiffs have abandoned the freight. It is true that in one sense they have abandoned it, they have thrown up the adventure, and if there was anything to earn have, so far

(1) 1 Macq. Sc. Ap. 328, 334.

as in them lay, deprived the Defendants of the possibility of its being earned. But they have made no abandonment in the sense of transferring to the Defendants a thing of value, anything which might go in part to indemnify them against the payment of the loss. The abandonment was a mockery, there was nothing to abandon, not even a right of action against *De Mattos* for not loading the ship. It is an abuse of language to call this an abandonment of freight in the sense and meaning of the word in reference to a contructive total loss.

In the case of *Scottish Insurance Company* v. *Turner* (1), there were separate insurances on ship and freight. The ship sustained such damage as to justify an abandonment, but it was not known until the arrival of the ship with her cargo at the port of discharge. The Plaintiff then abandoned to both sets of underwriters. The underwriters on ship seem to have accepted the abandonment and became entitled to the freight. The Plaintiff then brought an action against the underwriters on freight and claimed a total loss. He contended (the precise contention of the Plaintiffs here) that the real cause of the loss to him was the perils insured against, that the abandonment of the ship was a legal and proper act superinduced by these perils; that it made no difference to him that the freight was earned by the master of the ship, who became agent to the underwriters on ship by the abandonment, *as it was lost to him.* The Court of Session in *Scotland* held him entitled to recover, but your Lordships reversed the judgment, and held that the freight was lost to the Plaintiff by his own election in abandoning to the underwriters on the ship, and not by the perils which caused or led to that election. This appears to strike at the root of the argument on behalf of the Plaintiff, that the freight was lost by the damage sustained at *New Zealand.* It was said this case did not govern the present, because the abandonment was after the freight was earned. I do not see how this affects the principle of the judgment. But in the case of *McCarthy* v. *Abel* (2) the abandonment was before the freight was earned.

I think these cases have a distinct bearing upon the present question. The Plaintiffs could have repaired the ship, but, for their own pecuniary interest, elected not to do so, and abandoned it.

(1) 1 Macq. Sc. Ap. 328, 334. (2) 5 East, 388.

1873

RANKIN v. POTTER.

The present question is, did they thereby secure to themselves the sum insured on freight as if the ship had gone to the bottom at *New Zealand*, or did they discharge the underwriters on freight?

There is a farther subordinate point, viz., that the Defendants were discharged by the delay at *Otago*. I have already said that in my opinion *De Mattos* was thereby discharged from the obligation to load the ship. He was entitled to have the ship dispatched from *New Zealand* in a reasonable time, and he was neither directly or indirectly concerned with the want of funds wherewith to repair her between July, 1863, and February, 1864. The ship was used for a very considerable time as a store ship, a purpose quite beside and foreign to, indeed inconsistent with, the due prosecution of the voyage contemplated by the charter and the policy of insurance. The time is not stated, but it must have been considerable, as the storage rent amounted to between seven and eight hundred pounds. Looking at the time actually occupied by the repairs and by the voyage to *Calcutta*, the ship ought to have been there in October or November, 1863, and no one can tell what would have been the consequence if it had arrived before *De Mattos*' failure, and had found a cargo awaiting its arrival by the carriage of which a good freight would have been earned. It might have materially affected the judgment of the Plaintiffs as to repairing. It may be said that the occasion of the delay was the perils insured against, and had there been no damage there would have been no delay. But the underwriters on freight were under no obligation to make these repairs, or provide funds for the purpose. The delay for a time necessary to make them was excusable; but the delay from July to February consequent upon the misunderstanding between the Plaintiffs and their agent at *Otago* as to advances seems to me to be the misfortune of the Plaintiffs, and one with which the Defendants are in no way connected. I agree with the judgment of the Court of Common Pleas, that great and substantial delay is attributable to the Plaintiffs in keeping the ship at *Otago*, and is traceable to causes for which they and the master were alone answerable, and not to sea perils. The question is, does this delay discharge the Defendants? The case of *Mount* v. *Larkins* (1) and the judgment of

(1) 8 Bing. 108, 122.

Chief Justice *Tindal*, were much relied on. He says that the voyage "commenced after an unreasonable interval of time becomes a voyage at a different period of the year, at a more advanced age of the ship, and in short a different voyage from that prosecuted with reasonable and ordinary diligence; the risk is altered from that which was intended by all parties when the policy was effected." Besides this, it seems to me that persons who carry on the business of underwriting have a right to have the voyage insured prosecuted with due and reasonable dispatch, in order that their risk may be determined within a reasonable time. There can be no doubt as to the delay. The question is, do the facts stated in the special case excuse it as between the Plaintiffs and the underwriters on freight? I think they do not. The law and all the cases on the subject will be found in Mr. *Arnould's* book (1).

The result is, that in my opinion there are only two ways by which the Plaintiffs below can establish a case against the Defendants. One is, that the sea damage at *New Zealand* being such as would have justified an abandonment and a claim for a constructive total loss of ship, was a loss of the freight by perils of the sea at *New Zealand*, and entitled the Plaintiffs to maintain an action upon a writ sued out immediately after this damage occurred. This I think not sustainable, and that until the Plaintiffs elected not to repair and not to prosecute the voyage from *Calcutta*, there was not a loss of the freight "by perils of the sea" in any sense. The other argument of the Plaintiff is, that all the circumstances of the case, including the election not to repair and the abandonment of the ship and freight in August, 1864, constituted a loss of the freight by perils of the sea. I have already stated at length why I think they do not. It may suffice to state here that one of these circumstances, viz., that no cargo ever existed whereby freight could be earned, created the real and actual loss of freight before the election not to repair and the abandonment were made, and that this, and not a peril of the sea, was the direct and proximate cause of the loss of freight to the Plaintiffs.

(1) Vol. i., c. xiii., s. 5, p. 383.

1873
RANKIN
v.
POTTER.

The liability of the underwriters is upon a written contract, if the contract be that they shall pay £4000 if the ship should sustain damage from the perils insured against on the voyage from the *Clyde* to *New Zealand* and the thirty days there, to such an extent that a prudent uninsured owner would not have repaired, or in other words be a wager policy that such damage should not occur, the underwriters are liable. On the other hand, if the contract be one of indemnity, and that it is essential for the Plaintiffs to shew that the freight insured was lost to them by reason of such damage, the underwriters are not liable, for as a matter of fact it is established beyond doubt or controversy that the freight, and all remedy in respect to it, was lost to the Plaintiffs by the insolvency of *De Mattos* and its consequences, and the unjustifiable detention and delay of the ship at *New Zealand*.

The facts stand in the following order:—First, policy on freight; secondly, damage to ship capable of being repaired, but to such an extent as to make repair not prudent for shipowner; thirdly, failure of charterer to provide cargo wherewith to earn the freight; fourthly, election not to repair.

The question is, are the underwriters on the freight liable under these circumstances? I think they are not.

I answer your Lordships' first question, that there was not a loss by the perils insured against during the term of the policy.

I answer the second, that notice of abandonment either of ship or freight was not necessary in one sense of the word "abandonment;" but notice of the election of the assured not to repair, and to give up and abandon the voyage, was, under the circumstances, necessary, to enable the assured to maintain an action against the underwriters.

I answer the third question, that if notice of abandonment was necessary it was not given in time.

I answer the fourth question, that the notice of abandonment of ship does not, as such, affect the right of the Plaintiffs upon the policy on freight.

I answer the fifth question, that there was such conduct on the part of the assured as discharged the underwriters from their liability upon the policy on freight.

I answer the sixth question, that judgment ought to be given for the Appellants.

1873. May 5. LORD CHELMSFORD:—

My Lords, this is a case of some novelty, and from the difference of opinion which has existed upon it amongst the Judges must be regarded as not entirely free from difficulty.

The action is upon a policy of insurance upon freight to be earned by a ship called the *Sir William Eyre*, of which the Plaintiffs were owners as mortgagees under a charterparty entered into with one *De Mattos* on the 9th of February, 1863, by which it was agreed that the ship should proceed to *New Zealand* with a cargo for the owners' benefit, and having arrived and discharged the same, and being made tight, staunch, and strong, and every way fitted for the voyage, should proceed to *Calcutta*, and there being tight, staunch, and strong, and every way fitted for the voyage, should load from the factors of the freighter a full and complete cargo, and convey it, for certain stipulated freight, to *Liverpool* or *London*.

The policy of insurance is "lost or not lost at and from *Clyde* to *Southland* while there, and thence to *Otago* (*New Zealand*), and for thirty days in port there after arrival." The subject of the insurance is "£4000 on homeward chartered freight."

The *Sir William Eyre* arrived at *Bluff Harbour, Southland*, on the 23rd of April, 1863. While there she drifted and took the ground, and remained aground, floating at intervals till the 29th of May. On that day a violent gale arose, and again the ship took the ground, and remained fixed till the 4th of June. After that she grounded again, and was not finally got off till the 1st of July, when she left for *Dunedin;* and she arrived at *Port Chalmers*, which is the port of *Dunedin*, on the 4th of July. Surveys were held on her at *Bluff Harbour* and also at *Port Chalmers;* but in neither of these places could the extent of the damage sustained by her grounding be ascertained, as it was necessary for that purpose that she should be taken into a dry dock, or put on a patent slip, neither of which existed in *New Zealand*, nor was to be found anywhere nearer than *Port Sydney*.

While the *Sir William Eyre* remained at *Port Chalmers* the

1873

RANKIN v. POTTER.

captain permitted her to be stored with coals, for which he received a rent.

In February, 1864, the captain received funds, by means of which he had certain repairs done which had been recommended by the surveyors, to enable the ship to proceed in ballast to *Calcutta*. On the 14th of April, 1864, these repairs having been completed, the *Sir William Eyre* left *Port Chalmers*, and she arrived at *Calcutta* on the 7th of June, 1864.

Upon her arrival the master applied to the agents of *De Mattos* to carry out the charterparty. They, however, had received information that *De Mattos* had failed and stopped payment in December, 1863, and they refused to have anything to do with the ship, or with providing a cargo.

The *Sir William Eyre* was then put into dry dock and surveyed, and it was discovered that the damage she had sustained in *New Zealand* was much greater than had been supposed, and that the cost of repairing her would exceed her value after being repaired. Whereupon, in the month of August, 1864, the Plaintiffs gave notice of abandonment to the Defendant the underwriter on freight, and a similar notice was given by them to the underwriters on ship: but neither of the notices was accepted by the underwriters.

Upon the argument of the case in the Court of Common Pleas it was held that the Plaintiffs were not entitled to recover, on the ground that there was no absolute loss of the ship, and consequently no total loss of the freight; and that the notice of abandonment which was necessary to convert a partial into a total loss was not sufficient. Upon appeal to the Court of Exchequer Chamber, the judgment of the Court of Common Pleas was reversed, on the ground that the loss of the freight was not a partial loss, but one that was total and absolute.

Two of the Judges in the Exchequer Chamber expressed an opinion that supposing it to be doubtful whether, if no notice of abandonment of either ship or freight had been given, the underwriters on freight would have been liable, yet as notice of abandonment was in fact given to the underwriters on the ship, and was clearly in their opinion given in sufficient time, the ship belonged to the underwriters, and it therefore became impossible for the

owners to earn the chartered freight, of which there was consequently an actual and not merely a constructive total loss.

Upon this appeal from the judgment of the Exchequer Chamber the questions raised were—

1st. Whether there was an actual total loss of the chartered freight by perils insured against during the term of the policy?

2nd. Whether notice of abandonment either of ship or freight, or both, was necessary to enable the Plaintiffs to recover for a total loss on the policy on freight?

3rd. If notice of abandonment was necessary, whether the notice was given in time?

4th. Whether the conduct of the Plaintiffs, the owners of the ship, after the time of the injury sustained by her at *New Zealand*, was such as to discharge the underwriters from their liability upon the policy on freight?

First, upon the question as to the loss of the freight, it is necessary to bear in mind the exact nature of the insurance. The freight insured is chartered freight upon a cargo to be loaded on board the *Sir William Eyre*, at *Calcutta*, and to be conveyed to *Liverpool* or *London*. The voyage insured is a voyage "at and from *Clyde* to *Southland*, while there, and thence to *Otago* (*New Zealand*), and for thirty days in port there, after arrival." In other words, it is an insurance that the assured shall not be prevented earning the freight under the charterparty by any perils of the sea which might happen on the voyage from *Clyde* to *Otago*, and for thirty days afterwards. As this outward voyage is entirely distinct from that on which the freight was to be earned, and as no right to such freight could possibly accrue until the arrival of the *Sir William Eyre* at *Calcutta*, the loss of freight could only happen by such damage to the ship by the perils of the sea during the time covered by the policy as would prevent the assured from earning the chartered freight on the voyage from *Calcutta* to *England*.

It is admitted that the sea damage which the ship sustained at *New Zealand*, during the time covered by the policy, was such as would have justified an abandonment, and a claim for a constructive total loss. The owners might, if they pleased, have repaired the ship, and she might have been sent to *Calcutta* in a fit state for a voyage from thence to *England*. But they merely effected

1873
RANKIN
v.
POTTER.

temporary repairs sufficient to enable the ship to reach *Calcutta*; and on her arrival there a survey disclosed the extensive nature of the injuries which she had sustained in *New Zealand*, and the consequent impossibility of her performing the homeward voyage without such an amount of repairs as would have cost more than what her value would have been when repaired. Upon this fact being ascertained, notice of abandonment was given to the underwriters, which, if sufficient, would have entitled the shipowners to recover for a total loss.

Upon these facts and circumstances the first question arises, Was there a total loss of the freight during the period covered by the policy?

In determining this question, I think it right to leave out of consideration the fact of the insolvency of *De Mattos* before the arrival of the ship at *Calcutta*, because, although one of the learned Judges whose assistance your Lordships had upon the hearing of the appeal, delivered an opinion that "the freight was not lost by perils of the sea, but that the proximate and direct cause of its loss was the non-existence of cargo," it appears to me that this is not a correct view of the case. Between the underwriters and the assured on freight the question is, whether the ship had sustained such damage in *New Zealand* as to prevent her arriving at *Calcutta* in such a state of seaworthiness as would enable her to be tendered to the charterer in the terms of the charterparty, as being "tight, staunch, and strong, and every way fitted for the voyage" to *England*. Upon this question it is obviously immaterial whether a cargo would have been provided at *Calcutta* or not. The loss for which the underwriters are liable (if at all) cannot depend upon such a contingency; and if it could, it must be observed that their liability attached long before the insolvency of *De Mattos*, which happened in December, 1863, months after the ship had sustained the sea damage for which the claim upon the underwriters is made.

In the arguments the counsel for the Appellant complicated the question by introducing the consideration of the conduct of the Plaintiffs with reference to the policy on the ship, as bearing upon their rights under the policy on freight. It appears to me that this cannot properly be done in this case, where the injury to

the ship was practically not reparable. The contracts are entirely independent of each other, and between different parties. The rights and liabilities under the policy on freight ought to be determined without reference to what may have been done, or omitted to be done, by the assured on a policy on the ship upon which his rights under that policy may depend.

A plain and clear view upon the facts and circumstances of the case can only be obtained by removing the policy on the ship out of the way, and looking at the case as if there were no other policy in existence but that on freight. Under this policy, it seems to me that the only question is whether, by the perils of the sea, the ship was so damaged at *New Zealand*, during the term of the policy, as to be rendered incapable, unless sufficiently repaired, of performing the voyage from *Calcutta* to *England*, for which she was chartered. Upon that subject it appears, from the admission to which I have already adverted, that the sea damage was such as would have justified an abandonment and claim for a constructive total loss. By this I understand that the amount of damage was such that a prudent uninsured owner would not have incurred the expense of repairing the ship. And this appears clearly from a farther admission stated in the report of this case in the Court of Common Pleas (1), viz., that the cost of repairing the vessel at *Calcutta*, so as to make her seaworthy for carrying a cargo to *England*, would have exceeded the value of the ship when repaired, plus the difference between the chartered freight and the current freight, which would amount to about £450. No prudent man would, in such a state of things, incur the expense of repairing the ship; and the shipowners electing not to repair were entitled to consider the charter at an end, and the chartered freight as totally lost by a peril of the sea.

Secondly: The next question to be considered is, whether the assured can recover against the underwriters without a notice of abandonment. The counsel for the Appellants argued that by the law of marine insurance a notice of abandonment is in every case required, just as by the law merchant notice of dishonour is upon bills of exchange. The rule as to abandonment seems to be that which was referred to by Mr. Justice *Blackburn*, as contained

(1) Law Rep. 5 C. P. 351.

1873
RANKIN
v.
POTTER.

in Mr. *Phillips'* book on Insurance, sect. 1491, where he says: "An abandonment being a transfer, it can be requisite only where there is some assignable transferable subject on which it can operate. When nothing remains to be assigned or transferred an abandonment is useless and unnecessary." It must be observed that "abandonment" and "notice of abandonment" are two distinct and separate things, though they are frequently confounded together in expression.

Where a notice of abandonment is given it is conclusive proof that the assured intends to claim from the underwriters for a total loss; and then the assured must (as Lord *Cottenham* said in *Stewart* v. *Greenock Marine Insurance Company* (1), "give up to the underwriters all the remains of the property recovered, together with all the benefit and advantage belonging or incident to it; or rather" (he adds) "such property vests in the underwriters."

But although an abandonment or cession must be the necessary result of every claim for a total loss, it does not follow that notice of this abandonment must always be given to the underwriters before a total loss can be claimed.

It was argued at the bar, on the authority of the case of *Knight* v. *Faith* (2), that in every case where the subject-matter insured exists in specie, though in a damaged state, a notice of abandonment is necessary to entitle the assured to make a claim as if it had been actually destroyed. This was the opinion expressed by Lord *Campbell* in delivering the judgment of the Court in that case. The necessity for a notice of abandonment was not considered upon the first argument, but the Court desired to hear the case farther argued on the question whether, under the circumstances of the case, the Plaintiffs could claim for a total loss without giving notice of abandonment. It seems to have been quite unnecessary for the determination of the case to introduce this question, because the circumstances were such that the assured could not have been entitled to recover for a total loss if he had given the most timely and sufficient notice of abandonment. Lord *Campbell* had before, in the case of *Fleming* v. *Smith* (3), stated the rule as to notice of abandonment in the

(1) 2 H. L. C. 183. (2) 15 Q. B. 649. (3) 1 H. L. C. 535.

same unqualified terms, saying: "According to all the old authorities, a constructive total loss can only entitle the owners to recover as for an actual total loss, by a notice of abandonment."

It had been previously decided by the Exchequer Chamber, in the case of *Roux* v. *Salvador* (1), that notice of abandonment was unnecessary where it could be of no use to the underwriters, who, in that case, if they had received notice of the loss, could have exercised no control over the goods insured, nor by any interference have altered the consequences. The case was an action upon a policy of insurance upon hides from *Valparaiso* to *Bordeaux*. On the voyage the hides were found to be in a state of putridity, occasioned by a leak in the ship, and they were sold for a fourth of their value at *Rio Janeiro*. The assured received the news of the damage to the hides and of their sale at the same time. The Court of Common Pleas (2) gave judgment for the Defendant, the underwriter, on the ground that the assured could not recover as for a total loss without a notice of abandonment. But this judgment was reversed in the Court of Exchequer Chamber; and Lord *Abinger*, in a very elaborate and carefully considered judgment, laid down the principle as to notice of abandonment when an assured claims for a total loss and part of the subject insured remains in specie, that notice is only necessary to be given where upon receiving it the underwriters could do something in the exercise of their rights over the salvage. In that case, the assured receiving the news of the damage to the hides and of the sale of them at the same time, a notice of abandonment to the underwriters would have been idle and useless.

In *Farnworth* v. *Hyde* (3), under similar circumstances of the loss of the ship insured, and of her sale having reached the assured at the same time, it was held that the underwriters were liable for a total loss without notice of abandonment. This seems to place the rule as to notice of abandonment on a reasonable foundation. No prejudice can possibly arise to the underwriters from withholding a notice where it is wholly out of their power to take any steps to improve or alter their position.

Upon this ground, therefore, I am of opinion that there was no

(1) 3 Bing. N. C. 266. (2) 1 Bing. N. C. 526.
(3) 18 C. B. (N.S.) 835. 11 Jur. N.S. 349. 34 L.C.P. 207

1873
RANKIN
v.
POTTER.

necessity for the assured in this case to give notice of abandonment of the chartered freight to the underwriters. Mr. Justice *Willes*, in delivering judgment in the Court of Common Pleas, apparently adopting the rule as laid down in *Knight* v. *Faith* (1), said: "The general rule of insurance law applies, that where the thing exists in specie (and here the thing insured, viz., the chance of earning the freight, did survive the risk) and can be restored, though at an improvident expense, in order to make a total loss there must be an abandonment." But I am at a loss to understand what chance of earning the freight can be said to have existed after the ship *Sir William Eyre*, mentioned in the charterparty, had sustained such sea damage as to render her incapable of performing the voyage by which the freight was to be earned, and had become at the election of the owners a total loss. The underwriters could not have substituted any other ship, and tendered her to the charterer in performance of the charterparty on the owner's part.

It was suggested in argument that the underwriters on freight, if they had had timely notice of abandonment, might have arranged with the underwriters on ship to repair the ship at their joint expense, and have sent her on to *Calcutta*, and tendered her to *De Mattos* in fulfilment of the owner's contract. But this is the suggestion of a mere possibility, and contains in it nothing practical, nor can it reasonably be taken into account in judging of the rights and liabilities of the parties. I have no difficulty in coming to the conclusion that there was no necessity for any notice of abandonment of the chartered freight to the underwriters on freight.

Thirdly: This being my opinion, it seems to me wholly unnecessary to consider whether the notice of abandonment which was given was given in time. The rule is, where notice of abandonment is necessary it must be given in a reasonable time after information of the damage which has occurred to the subject of insurance. Whether sufficient notice was given depends upon the facts of each particular case, and the decision upon one case can be no authority or guide upon any other. I must therefore decline to express any opinion with which of the learned Judges I should be disposed to agree upon this question.

(1) 15 Q. B. 649.

Fourthly: There only remains to consider the question whether the conduct of the owners of the ship after the damage she sustained was such as to discharge the underwriters on freight. Upon this I have already incidentally made some observations. It is unnecessary to examine in detail the various acts by which it was contended that the owners had elected to retain the ship, and to come upon the underwriters merely for a partial loss. I think that they had precluded themselves by dealing as they did with the ship, and also by delaying so long their claim for a total loss. But I do not see how the conduct of the shipowners, however it may affect their rights under one contract, can have any influence on their rights and the liabilities of another party under a separate and independent contract. If the sea damage which the ship sustained in *New Zealand* was such as to reduce her to a state which rendered her utterly incapable of performing the voyage to *England* without an expense which no prudent uninsured owner would incur, then the freight was totally lost from that moment, and how the owners chose to deal with the disabled ship afterwards was wholly immaterial. If the damage to the ship had been such that it might have been repaired at a reasonable expense and put into a condition to earn the freight, and the shipowners had declined to take this course, they would have lost the freight not by the perils of the sea but by their election. But the damage being such as to render the repair of the ship practically impossible, the question between the assured and the underwriters on freight must be regarded as if there were no policy on the ship; and then it becomes the simple consideration whether the freight was not totally lost by the perils of the sea, by what must be regarded, in relation to it, as the total destruction of the ship by which it was to be earned.

I think that the judgment of the Court of Exchequer Chamber ought to be affirmed.

LORD COLONSAY:—

My Lords, this case appears to be attended with a great deal of nicety. It is novel, too, in its circumstances. Indeed, the policy here is peculiar, and the consequence has been that there has been a great deal of difference of opinion among the Judges, and a

1873
RANKIN
v.
POTTER.

great expenditure of ability and of ingenuity in discussing the question. It appears to me that a good deal of that has been expended in consequence of mixing up together things which are substantially separate. I think there are two questions, or rather, perhaps, only one, namely, whether the freight was lost by reason of the perils of the sea insured against; and I think that that question must be considered altogether separate from the question of an insurance by other parties upon the ship. Now, notwithstanding that one of the learned Judges, of whose assistance we have had the benefit, and for whose opinion I entertain the highest respect, has expressed the opinion that the loss was not caused by the perils insured against, but by the inability of *De Mattos* to furnish a cargo, I am compelled to differ from him. It appears to me that, upon the admission contained in Article 24 of the case, we are to hold that the condition of things within the period to which the insurance applied was such that the vessel was in a condition in which an abandonment might have been made as for what is called a constructive loss; that is to say, that she was not in a condition to be worth repairing. If that be so, I think that the liability then attached, and that the risk having been incurred, and the peril having been sustained, and the vessel having been rendered incapable of earning the freight by reason of that damage done at sea or in port within the period insured against, that terminated the question. No doubt it was not then ascertained what the damage was, but it was afterwards ascertained that that damage was sustained within that period, and that must be treated as an admission in the case.

Now, I do not see how the matter of *De Mattos* having failed in the month of December, and having been unable to supply a cargo, or having declined to supply a cargo, is a matter which can be said to be the cause of the loss of the freight. Something is said about proximate and remote causes, and these are matters which are very apt to lead us into philosophical mazes; but I think it is very clear that, before *De Mattos* failed, the ability to earn the freight was gone by reason of the perils insured against having happened, and that appears to me to be sufficient. *De Mattos* was under no obligation, it is said, to furnish a cargo, because of the delay of the owners of the vessel to tender the vessel. I think *De Mattos* was

under no obligation to furnish a cargo, unless there was presented to him a vessel fit and sufficient to carry that cargo to *Britain*, and that was the failure that occurred. There was no vessel fit and sufficient to carry the cargo to *Britain* presented to *De Mattos*, and that was a state of matters that occurred before the vessel arrived at *Calcutta*.

The only other question is the question as to the notice of abandonment. I think that throughout this matter we must consider this case as if there had been no insurance upon the ship. If there had been no insurance upon the ship, what would have been the object of the notice of abandonment, or what was to be gained by such a notice being given? I do not see, after what has occurred, what the underwriters on the freight could have done. The vessel was not fit to be repaired. They could not have compelled the owners to repair her when she was not worth it. What was to be gained, then, by the notice of abandonment being given? It is true there was a puzzle raised by some of the Judges as to who would have been the party entitled to the freight, and, therefore, the party who would have been entitled to the insurance upon the freight, if the vessel had been timeously abandoned, and had been repaired, and freight had been earned. But, my Lords, I do not think that there is really any puzzle in the case at all. At all events, it is clear that if the freight had been earned, there would have been no loss of the freight, and a different condition of matters would have arisen. The question as to the right to demand the insurance if the vessel had been lost is a different question altogether. The only party who had a right to demand the insurance is the party who effected it; and if there had been no insurance upon the vessel, that right would equally have existed with regard to the freight. I therefore think there is really no substantial ground for this question as to the notice of abandonment; and until there is more decided authority adduced upon the subject, I am not prepared to receive the doctrine that notice of abandonment in a matter of this kind stands upon the same mercantile footing as notice of dishonour of bills of exchange. The reason of the thing, in my apprehension, is against that doctrine. I think that the reason of the thing tells us that where there is nothing substantially to abandon to the party to whom the

1873
RANKIN
v.
POTTER.

notice of abandonment is given, and he could gain nothing by it, then it is not necessary to give that notice. Therefore I think that all that puzzle which has arisen from the circumstance of there being an insurance upon the vessel is quite out of the question when you come to consider purely the liability of the underwriters upon the freight. In this case it appears that there was no timeous notice of abandonment, or no notice of abandonment at all, according to a judgment elsewhere; and therefore in that view also the question would not arise. But I think the real question is, whether the right to freight was lost by the perils of the sea during the period embraced in the policy of insurance. I think it was, and I think the liability attached, and I see nothing afterwards to relieve the parties from that liability.

LORD HATHERLEY:—

My Lords, in this case, which is slightly complicated in its details, we are extremely obliged to the learned Judges who have assisted us by giving us their opinions, and we are also indebted to the learned counsel at the Bar for so thoroughly sifting it that, like many other cases which appear complicated and difficult on the first blush and opening of the matter, those difficulties are cleared away and the whole matter reduced to very simple principles when there has been a thorough discussion of the subject.

My Lords, the case is really now brought simply to this. The owner of a ship under a certain charterparty arranges that his vessel, being about to proceed to *New Zealand*, shall, after her voyage thither, and after a certain delay there, proceed to *Calcutta* and take on board a cargo from one *De Mattos*, he having, in the first instance, entered into that undertaking with him. When she arrives at *Calcutta* she is to be tendered to *De Mattos* for the purpose of receiving the cargo to be so provided, and she must then be in a condition sufficiently staunch, tight, and strong for the purpose of her voyage from *Calcutta* to *England*, or rather *Great Britain*, in order to earn the freight that will then be due from *De Mattos* in respect of her so having conveyed his goods. This being the entire course of the vessel's proceeding, the owner is minded to insure himself against the perils of the sea, in two respects, first, as regards the vessel, and secondly, as regards the

freight to be earned between *Calcutta* and *England*. I mention this because there can be no reasonable doubt (indeed the learned Judges said they hardly thought it right to consider the question as it was not raised) that, however peculiar the form of this policy may be (and it is of a somewhat unusual form), there is nothing to prevent any person, during the whole course of the voyage, insuring against the perils of the sea during any part of that voyage, whether the perils of the sea may occur during that part of the voyage as to which the ship is insured, or whether the chance of loss against which insurance is effected may be the chance of her being so damaged in the anterior part of the voyage as not to be able to fulfil the subsequent part of her voyage (in respect of which part of the voyage itself she is not insured), and in consequence of being unable to fulfil the subsequent part of the voyage she cannot earn the freight which is insured.

I think one of the learned Judges, who has given a very valuable and able judgment in this case, though I do not agree with him, Mr. Baron *Martin*, seems to have thrown out some slight doubt as to whether or not the mode of effecting this policy was one that could be sustained. But he dwelt but lightly upon that point, and I need say no more upon it, because no authority was cited for saying that the insurance which was effected was in any way contrary to the law of insurance. The insurance effected was simply this: the vessel was to proceed to *New Zealand*. During the whole period of her voyage thither, and of her stay there for thirty days, she is not, says the policy, to be injured or damaged by perils of the sea to such an extent as to prevent her being staunch, tight, and strong enough on her arrival at *Calcutta* to take the expected cargo to *England*. That is the undertaking which is given by the policy, and that is the risk which is insured against. It is clear and plain, from the admissions in this case and the evidence that has been given, that she was injured during the period insured against, that is to say, she was injured just about the time of her arrival at *New Zealand*, and while she was in the neighbourhood of *Bluff Harbour*. She was injured to such an extent that, although at *Bluff Harbour* it could not be ascertained what the extent of the injury was, and although at *Dunedin* a certain amount of repair was effected which enabled the vessel to proceed to *Calcutta*,

1873

RANKIN v. POTTER.

she was not staunch, tight, and strong enough for the voyage to *England* when she arrived at *Calcutta*, and her being in that condition was wholly due to the injuries she had sustained during the insured period.

It is farther admitted in the case that the injury was of such a character that no prudent owner would have repaired her for the benefit of the contract which had been entered into as to freight, because, in order to make those repairs, it would have been necessary to expend more than the whole value of the ship; in other words, when it was ascertained what the extent of the injury was, it was found that she was in such a condition that, had the owners been minded to abandon her at the time when the injuries were sustained to those who had taken the policy on the ship (and who must be distinguished from those who had taken the policy on the freight which is now before us), they would have been justified in so doing. As between the owners and those who insured the ship itself there might arise a question, and indeed there did arise a question, which was determined, I think, in the action against *Campbell*, as to whether or not they had given timely notice of the abandonment of the vessel to those who had insured her, or whether by their conduct in delaying her voyage to *Calcutta* for a very considerable time, by their employing the ship in the meantime to a certain extent as a store-house for coals, and by taking other steps which occasioned great and possibly unnecessary delay in *New Zealand* before giving notice of abandonment, they had put themselves in such a position, as respected those who had insured the vessel, as to have lost their right of abandonment. But that matter appears to me, I confess, as it seems to have done to your Lordships who have preceded me, to be wholly immaterial as regards the question before us in respect of the insurance on the freight. When the vessel came to *Calcutta* it appears that there was (and this was somewhat relied upon), in the first instance, an actual tender of the vessel to *De Mattos*, but it was found that *De Mattos* had become insolvent, and those who represented him, the assignees of *De Mattos*, declined to furnish any cargo. All this took place before there had been a thorough examination of the amount of the injury in *Calcutta*. When a thorough examination took place afterwards the result was what I have described, that no prudent

owner would have thought of putting her into a condition to continue her voyage to *Great Britain*.

That being so, it appears that every element of the contract with the underwriters upon the freight is brought out in a clear and distinct light, shewing that the liability of the underwriters on the freight had actually accrued, unless indeed the question that has been raised with respect to the notice of abandonment as applying to the insurance of the freight should prevail with your Lordships. The ship had undoubtedly been insured during the period when the injury was sustained. The ship undoubtedly, in consequence of that injury, was unable to perform the voyage, and could not therefore be tendered in the condition in which she ought to have been tendered to *De Mattos*, and therefore the freight was lost in consequence of that injury. I will postpone for the moment the consideration of the question of *De Mattos'* insolvency.

Putting the question aside as to how far *De Mattos'* insolvency may be regarded as the proximate cause of the loss of freight rather than the damage sustained by the ship in the anterior part of the voyage, there comes the question, Was it or was it not necessary to give a notice of abandonment in this case, and if necessary, was it given in time?

As regards the necessity for giving notice of abandonment, I think that is the point that was most vigorously pressed upon us by the counsel for the Appellant, who relied upon some *dicta* of Lord *Campbell* upon the subject, and contended strongly that it was necessary in all cases whatsoever of a claim upon underwriters as for a total loss upon a policy, for the owners to give notice to the underwriters of abandonment of the thing insured, whatever might be the circumstances or the position of the insurers or the insured, and whether in truth any advantage could possibly be made of that notice of abandonment or not. It was put upon this ground, that it was rather for the underwriters to say in their judgment what advantage they might be able to derive from that notice of abandonment so given in regard to their position on their policy. I apprehend, my Lords, that certainly no authority has been cited to shew that this notice of abandonment is to be considered necessary in a case where no such advantage could possibly

1873

RANKIN v. POTTER.

accrue to the underwriters. If the vessel be not really wholly lost, if it be only a constructive total loss, as it is termed (though that is perhaps not a very happy phrase), occasioned by the impossibility of effecting repairs, the cost of which will not exceed the whole value of the ship when repaired, then there being something *in esse* to be handed over to the underwriters, it is necessary that they should be informed of this in order that they may have an opportunity of making the best use they can of what remains—of that which the owners give up, in electing to make that a total loss which is not in fact a total loss, there being something in the nature of salvage, or fragments, or wreck, or something of that kind, which may be of value to the underwriters, although not of any to the owners. But in this case there is nothing suggested, and nothing can be suggested (except one single point which I will notice in a moment), as to any advantage that could have been derived by the underwriters from any such notice of a constructive total loss being given to them on the part of those who had insured.

The only exception is, that it is suggested that they might have said, "True it is, we insured that this freight should be earned, and certainly that earning depended upon the arrival of the ship at *Calcutta* in a condition to earn it. She did not arrive at *Calcutta* in a condition to earn it—it would have been folly to expend money in repairing the ship, which would have exceeded the value of the ship when repaired; but if you had told us that you were about to claim as for a total loss in respect of this freight, we should have been in this position: we should have found that you had insured the vessel; the underwriters on the vessel would have been in an equally disadvantageous plight with ourselves, having a heavy demand upon them in respect of their insurance, and we two together might have been minded to make such an arrangement each with the other that, regard being had to what we each should have to pay upon our insurances, it might have been worth our while to put the vessel into a state to earn the freight." Those who had insured the freight could not tender any other vessel. That question does not arise in the peculiar insurance we have before us, because it was an insurance of freight to be earned by the *Sir William Eyre* and by no other vessel. *De Mattos* of

course might have refused any other vessel than that; it could not be earned therefore by tendering any other vessel. It is supposed that if the underwriters on the freight had had timely notice, they might have made such an arrangement with the underwriters on the hull or the vessel herself as would have saved a total loss accruing.

I apprehend, my Lords, that that is much too remote a contingency to render it necessary for the insured to give the insurers notice of abandonment upon the principle which I have before referred to, namely, of their being able to save something out of the wreck. It is not necessary to illustrate that, but it might be shewn in a variety of ways how such a doctrine as that would carry the necessity of notice to the remotest extent in respect of bargains which might be made by persons who might or might not be interested at the moment in the ship, such as persons who might purchase the damaged vessel, or the wreck, or the like. Numerous arrangements might be made of that kind, which would create, I apprehend, far too remote an interest to be considered upon a question as to the law requiring notice of abandonment to be given. The whole principle of the notice of abandonment is, that you are to place the underwriters in such a position that they shall have all the advantages which you now possess in respect of the vessel, supposing that they can make those advantages available for the purpose of effectuating a salvage of some portion of that which has been lost in consequence of the perils which they have insured you against.

Now, my Lords, with regard to the observations made by Mr. Baron *Martin*, that the loss really was not a loss by perils of the sea, but was due to the insolvency of *De Mattos*, I think there is a clear fallacy in that view in two points, the first of which has been noticed by my noble and learned friend who first stated his views upon this appeal; it is, that the loss had accrued before the insolvency of *De Mattos* occurred. The loss accrued when the accident happened in which the damage occurred at *Bluff Harbour*, and that was some time before the insolvency of *De Mattos* took place. But I do not think it necessary to rest it upon that. I apprehend that it is not a thing which would absolve the underwriters from the liability for the loss which undoubtedly accrued on account of

1873
RANKIN
v.
POTTER.

the ship not being fit for the voyage. There is nothing to absolve them from the liability to pay the insurance in the circumstance of the insolvency of *De Mattos*, who in the chapter of accidents might have become solvent, and even wealthy again, before the necessity arose for the vessel completing her voyage. But the point that has to be looked at is this—Were the owners in a position to enforce their rights against *De Mattos*, whatever they may have been; were they in a position, by tendering the vessel to him, either to insist upon his paying the freight then and there, or to insist upon such rights as might accrue to them by action in respect of his non-performance of the contract; or were they disabled from occupying that position by the consequences resulting from the perils of the sea which arose at *Bluff Harbour*, preventing them from fulfilling their part of the contract with *De Mattos* by tendering to him a ship, staunch, tight, and strong, for carrying his goods to *Britain?* If that be the case, of course it is clearly and distinctly within the terms of the policy; and that being so, it seems to me clear that the underwriters must be liable, unless this one point, which was strongly insisted upon, of want of timely notice of abandonment, precludes their liability. I think your Lordships are all agreed that no such notice was necessary, and therefore it is unnecessary to consider the question as to the time at which such notice was given.

Therefore, my Lords, upon all the points, I think that the Appellants have failed, and consequently the appeal should be dismissed with costs.

Judgment of the Court of Exchequer Chamber affirmed; and appeal dismissed with costs.

Lords' Journals, 5th May, 1873.

Attorneys for Appellants: *Field, Roscoe, Field, & Francis.*
Attorneys for Respondents: *Thomas & Hollams.*

THE DIRECTORS, &c., OF THE TAFF VALE RAILWAY COMPANY . . . { PLAINTIFFS IN ERROR;

AND

J. M. MACNABB AND OTHERS . . . { DEFENDANTS IN ERROR.

1873
Feb. 18, 20, 21;
April 28;
May 9.

Covenants in a Lease—Railway and Docks—Ultrà vires—Costs.

If the directors of a railway company become, for the purposes of the company, lessees of land, with a privilege to use docks, and agree to pay rent and royalties to the owner of the docks, and enter into other conditions which, by a state of circumstances subsequently created, appear to be unreasonable and impolitic, such stipulations and conditions cannot, on that account, be treated as *ultrà vires* of the directors.

Nor can a condition to pay shipping dues, not only for goods actually brought along the railway and shipped at those docks, but for goods brought along the railway to be shipped at other docks, be treated as a covenant in restraint of trade.

The directors of a railway company, *T.*, in order to obtain the use of the *B. Docks*, then existing and situated near the end of their line, wherein to ship and unship goods carried along their railway, entered, in 1849, into a contract with the owners of these docks to pay certain dock and lockage dues, and accepted (under the authority of a private Act of Parliament) a lease for 250 years, by which they bound themselves to procure, as far as they could, all goods sent along their railway to or from ships, to be shipped or unshipped at these docks, and to pay certain dues and royalties in respect of all goods, &c., shipped or unshipped there which had been or should be conveyed "along the railway or any part or branch thereof:"—

Held, that this only applied to the railway or those parts or branches of it which were in connection with some place of shipment or unshipment.

The *T.* directors by the same lease also covenanted that when and so often as goods, &c., conveyed along the *T. Railway*, or any part or branch thereof, should be shipped or unshipped in any dock other than the *B. Dock*, the *T.* directors and their successors should pay to the *B.* trustees the same dues, &c., in respect thereof as would have been payable on such goods if shipped or unshipped in the *B. Dock*:

Held, that "shipped or unshipped in any other than the *B. Dock*" did not apply to goods carried along a part of the *T. Railway* and then along any other railway, and shipped at any dock whatever and wherever, but only to docks in connection with the *T. Railway* itself.

Semble, that any other construction of the covenant would make it both unreasonable and *ultrà vires*.

After this lease of 1849 had been made, certain private Acts of Parliament were passed which incorporated another body of persons as the *P. Company*,

1873

DIRECTORS,&C. OF TAFF VALE RAILWAY CO. *v.* MACNABB.

and authorized the construction by the *P. Company* of a line of railway and of docks; and also authorized the directors of the *P. Company* to grant, and the directors of the *T. Company* to accept, a lease of the new undertaking. The lease was duly executed under the powers of these Acts, and the *T.* directors thenceforth used the new line and the new docks, and discontinued the use of the *B. Docks*. In an action by the *B.* trustees upon the covenants in the lease of 1849:—

Held, that those covenants were not thereby violated; that the *P. Railway and Docks* having been made under Acts of Parliament passed subsequent to the lease, the fact of the *T.* directors becoming the lessees or assignees of the *P.* undertaking did not constitute the *P.* line of railway a "part or a branch" of the *T. Railway*; and that consequently the *T.* directors were not, by the use of the *P. Railway and Docks*, liable to the *B.* trustees as for breach of the covenants in the lease of 1849.

This being a proceeding in Error under the *Common Law Procedure Act*, no direction was given as to costs.

IN the 1 Will. 4 there passed (c. cxxxiii.), and in the 4 Will. 4 there passed (c. xix.), two private Acts by which the Marquis of *Bute* was empowered to construct docks and other works connected with the town of *Cardiff*. He was also empowered to demand wharfage and other dues in respect of goods and minerals landed or shipped therefrom. By the 6 Will. 4, c. lxxxii., certain persons therein described were authorized to make a railway from *Merthyr Tydfil* to *Cardiff*, to be called the *Taff Vale Railway*. This Act was amended and extended by other Acts, under which the company was empowered to purchase land and make a branch railway to *Cogan Pill*. In 1840 the *Bute Dock* was constructed by the Marquis, and the terminus of the *Taff Vale Railway* came upon land to the west side of that dock. There was then a small dock belonging to the *Taff Vale Railway Company* constructed to the westward of the terminus, and connected with the *Glamorganshire Canal*. The company was desirous of forming a branch railway on the east side of the *Bute West Dock*, and of obtaining convenient wharfage for shipping and unshipping of goods and minerals conveyed along the railway. This was what was intended to be the *Cogan Pill* branch. Difficulties arose as to the execution of this scheme. Negotiations took place between the trustees of the *Bute* property (now represented by the Respondents) and the directors of the railway company, and one part of the arrangement was the abandonment of the intended *Cogan Pill* branch. In August, 1846, the directors procured the passing of another private Act

(9 & 10 Vict. c. cccxciii.), which, after reciting the earlier Acts, and an agreement between the directors and the trustees, authorized the trustees to give, and the directors to take, a lease at the rents and subject to the conditions, &c., contained in the agreement. This was in substance confirmed by a subsequent Act (11 & 12 Vict. c. xx.).

By an indenture of the 1st of December, 1849, and in pursuance of these powers, the trustees granted certain pieces of land therein described, with power to make thereon a branch railway and sidings, &c., and to use the same for a railway. The lease was for 250 years, in consideration of certain rents and royalties thereby reserved. The directors covenanted that they would, during the said term, use and permit to be used the pieces of land demised for the purpose of shipping and unshipping goods, &c., into ships entering the *Bute Dock*, and that they would at all times during the term "cause and procure, so far as they should be able, all minerals, merchandise, and other goods which should be conveyed *upon or along the said Taff Vale Railway, or any part or branch thereof*, for the purpose of being brought to the sea-coast for shipment, to be shipped into vessels in the *Bute Dock*, or in some dock, basin, or cut belonging thereto, to the intent and so and in such manner as to give the said dock or the owner thereof the benefit of the trade or traffic arising in respect of such minerals, &c., and the wharfage and lockage dues for the same" . . . "And also cause and procure, so far as they should be able, all merchandise and other goods which should be unshipped at or near the port of *Cardiff, and carried or transported to or conveyed upon or along the said Taff Vale Railway, or any part or branch thereof*, to be unshipped in the said *Bute Dock*, &c., to the like intent," &c. They were to pay such rates, &c., as were mentioned in a schedule. "And when and so often, &c., as any minerals, merchandise, or other goods which should be or have been conveyed or transported *upon or along the said Taff Vale Railway, or any part or branch thereof*, should be shipped or unshipped, &c., into, upon, or out of any ship, boat, barge, craft, or other vessel" in the dock or basin belonging to the directors, adjoining their terminus [the small dock previously mentioned], "*or in any basin, dock, canal, or cut whatsoever other than the said Bute Dock*, or some dock, &c., belonging thereto,

1873

DIRECTORS, &C. OF TAFF VALE RAILWAY CO. v. MACNABB.

the said directors and their successors would, nevertheless, pay to the trustees, &c., or other the owner of the said *Bute Dock*, the same aforesaid several wharfage dues for and in respect of all and every such minerals, merchandise, and other goods as would have been payable for the same respectively, under the covenants in that behalf thereinbefore contained, as if such minerals, &c., had been actually shipped or unshipped, &c., in or at the said *Bute Dock*." There was a similar covenant as to lockage dues.

By an Act, 19 & 20 Vict. c. cxxii., the *Ely Tidal Harbour and Railway Company* was constituted, to make a railway commencing from the *Taff Vale Railway* and terminating on the north-east bank of the *Ely River*, to improve that river, and to construct an embankment adjacent to the west side of *Penarth Flats*.

By the 20 & 21 Vict. c. lxix. the name of the *Ely Company* was changed into the *Penarth Harbour, Dock, and Railway Company*, and farther powers were given, under which a railway was to be made commencing at the *Ely Tidal Harbour Railway* and terminating on the south-west bank of the *Ely*, and also a dock between *Cogan Pill* and *Penarth Head Inn*. This would open a direct and easy communication with the sea at the *Penarth* or *Cardiff Roads*. All the powers given to the *Penarth Company* under the former Act were to be exercised under this Act. The *Taff Vale Railway Company* and the *Penarth Harbour and Railway Company* were to have running powers over each other's lines. In 1859 the *Penarth Company* gave the *Taff Vale Company* notice of an intention to exercise these powers. The directors of the *Taff Vale Company* fearing the effect thereof, entered into negotiations with the directors of the *Penarth Company*, the result of which was that the *Taff Vale* directors were to take a lease for 999 years of the works and undertakings of the *Penarth Company*, paying thereon a certain fixed rent and a certain fixed interest on the capital of the *Penarth Company*. By the 26 & 27 Vict. c. lxxv. the *Penarth Company* was empowered to grant and the directors of the *Taff Vale Railway Company* to accept a lease in conformity with this agreement. The lease was accordingly executed, and the directors of the *Taff Vale Railway Company* have since used the *Penarth Railway and Dock* as their own, and have not used the *Bute Dock* under the lease of 1849.

The trustees of the *Bute* property, conceiving that all the minerals, &c., which passed "upon or along the *Taff Vale Railway* or any part or branch thereof," and were shipped or unshipped at the *Penarth Dock*, were subject to the dues agreed upon by the lease of 1849, brought an action to recover the amounts due in respect thereof, and also to recover damages for breaches of covenants. The facts were turned into a special case, which was argued in the Court of Queen's Bench in June, 1870, when the Court gave judgment for the Defendants. On error the Exchequer Chamber—but not unanimously—reversed that judgment. This proceeding in Error was then brought.

Sir *J. Karslake*, Q.C., Mr. *H. Matthews*, Q.C., and Mr. *Charles Hall*, were for the Plaintiffs in Error :—

The covenants in the lease of 1849 do not extend to shipments or unshipments in *Penarth Dock* or *Tidal Harbour*, but are confined to those made substantially from or to the *Taff Vale Railway* as it existed at the time of the lease. The *Taff Vale Railway Company* might afterwards have constructed a new line of railway and dock, and conveyed the goods along them to be shipped, without being guilty of a breach of covenant. The *Penarth* line, and dock and harbour, came into existence after that lease was executed, and under the authority of Acts passed after its execution. They were not contemplated at the time of its execution, and in no way fell within its words. They do not constitute "a part or branch" of the *Taff Vale Railway*. The covenant in the lease to endeavour to procure goods and merchandise passing along the *Taff Vale Railway* to be shipped and unshipped at the *Bute Dock* is not shewn to have been violated. Every person who sends his goods has a right to choose their place of shipment or unshipment, and the railway company has no power to control his choice. But if the covenants bear the construction put on them on the other side —namely, that goods which have passed along any part of the *Taff Vale Railway*, wherever destined to, if they are to reach the sea-coast, come within the covenant for payment of the dues—then as the conditions of the *Penarth* lease, which was authorized by Act of Parliament, could not be complied with, the conditions of the

1873

DIRECTORS, &C. OF TAFF VALE RAILWAY CO. v. MACNABB.

former lease are *ultrà vires* of the directors, and so could not be enforced; or, they are in restraint of trade, and so are illegal. *Mallan* v. *May* (1) was cited.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Hardinge Giffard*, Q.C., Mr. *Henry James*, Q.C., and Mr. *Edward Clarke*, were for the Defendants in Error:—

The words of the lease of 1849 were direct and clear. The covenants in that lease, even taken in their most extensive sense, were thoroughly *intrà vires* of the directors, and were made for a consideration at the time really valuable to the *Taff Vale Company*. The directors had not been able to make the dock they originally projected at *Cogan Pill*, and it was material for their interest to get such a lease as they got from the trustees. What they had agreed to was not in restraint of trade, but was rather for their own accommodation in carrying on their trade, and was calculated to increase it—and had, in fact, increased it. Wherever goods pass along the *Taff Vale Railway* or any part or branch of it in order to reach the sea, they fall within the words of the covenants, and are liable to the dues stipulated for in the lease of 1849. Such an agreement as that contained in the lease was not at all unreasonable in itself at the time it was made, and it is binding now. Nor can it be described as unprecedented, for in *The Lancashire and Yorkshire Railway Company* v. *East Lancashire Railway Company* (2) such an agreement had been made by the directors of an original line of railway, and the lease there was enforced as to an amalgamated line of railway.

Sir *J. Karslake* replied.

LORD CHELMSFORD:—

My Lords, the question upon this appeal arises upon alleged breaches by the Plaintiffs in Error of covenants contained in a lease made to them by the trustees of the Marquis of *Bute* on the 1st of December, 1849, of certain land on the east side of a dock belonging to him called the *Bute West Dock*. [His Lordship stated the facts of the case.]

(1) 11 M. & W. 653. (2) 5 H. L. C. 792.

Before considering the question of the covenants it will be proper to advert to some objections which were urged in argument against the validity of the lease itself.

It was argued that the passing of the lease upon the terms agreed upon was *ultrà vires* of the directors of the *Taff Vale Company*. By the Act empowering them to take a lease they were required to assume all the obligations of the *Penarth Company*. Under the *Penarth Act* that company was bound to apply the harbour rate entirely to preserving, maintaining, and improving the harbour and the navigation. The Board of Trade may reduce the harbour rate, but cannot increase it. If, then, the *Taff Vale Company* is, under the lease from the *Bute* trustees, bound, as contended, to pay to the trustees for all the traffic taken to *Penarth Dock*, the wharfage, &c., which would have been payable if it had been brought to *Bute Dock*, the directors have a lease without an income. But there is some confusion in this argument. The lease from the *Bute* trustees was made in 1849, many years before the lease of the *Penarth* undertaking. It was made upon conditions and stipulations which were sanctioned by Act of Parliament, and it was therefore within the power of the directors to accept. The question of *ultrà vires* must apply, if at all, to the lease of the *Penarth* undertaking taken with a knowledge of the conditions of the lease from the *Bute* trustees, which compelled the directors to pay for the whole of the traffic brought to *Penarth* harbour without deriving the smallest advantage from it. How this can affect the validity of the earlier lease taken from the trustees I am at a loss to imagine.

It was contended that the covenant for the breach of which the action was brought was void, as being in restraint of trade. No doubt if a person is, without consideration, prohibited from carrying on trade either absolutely or within an unreasonable distance from another, the prohibition is against public policy and void. But I cannot see how the covenant in question falls within that principle. The trustees lease to the directors land on the east side of *Bute Dock*, to enable them to use the dock for the shipping and unshipping of the traffic conveyed to and from their railway. The trustees grant to them the privilege of using the dock and the land leased, and afford them facilities for the use upon a payment to be

1873

DIRECTORS,&C. OF TAFF VALE RAILWAY CO. v. MACNABB.

made in a particular mode. It may be that this mode of payment is not a desirable one, and that more is exacted in the way of consideration than ought in prudence to have been agreed to; but how it can be considered to be in restraint of trade I cannot conceive. It is not a prohibition, but a permission to carry on trade. The directors tie their hands only by saying that in consideration of the advantages they will enjoy by the use of the dock, if they carry their goods anywhere else they will pay as if they had used the dock.

We now come to the main, indeed, in my view, the only question in the cause, viz., whether the taking, by the directors, of the lease of the *Penarth* undertaking, and carrying the minerals and goods to *Penarth Dock* and harbour for shipment, and receiving them after unshipment in the *Penarth Docks*, and carrying them along the *Penarth* railway on to the *Taff Vale* line, and conveying them to their destination, is a breach of the covenant.

I think there can be no doubt that the object of the covenant was to prevent the use by the *Taff Vale* directors of any dock other than the *Bute Dock*. They had proposed to construct shipping places at *Cogan Pill*, which would probably have drawn off some of the traffic from the *Bute Dock*. The abandonment of this intended branch of their railway seems to have been one of the inducements for the lease granted to them by the trustees. But another branch might have been made which would have been equally prejudicial to the trustees, and therefore they determined to require a covenant from the directors to restrain the latter from using, not only the small dock which then belonged to the directors, but also to prevent their constructing any other which might become a rival to the *Bute Dock*. The covenant was accordingly made to apply not only to the dock or basin "now belonging to the company," but, in the most general and extensive terms, to "any basin, dock, canal, or cut whatsoever, other than the *Bute Ship Canal*, or some dock, basin, or cut belonging thereto." If these words alone are regarded, the covenant would seem to extend to any dock however distant from the *Bute Dock*, although it could not possibly interfere with traffic that would find its way to the *Bute Dock*. But a limit is placed upon the words by the previous part of the covenant, which confines its provisions to

minerals or other goods which shall have been conveyed or transported upon or along the *Taff Vale Railway*, or any part or branch thereof, to be shipped or unshipped in the dock now belonging to the company, or in any dock, &c. whatsoever other than the *Bute Dock*. It would appear therefore that the large words "Dock, &c. whatsoever," must refer to some dock which is within the range of the line of the *Taff Vale Railway* in its communication with some place of shipment or unshipment.

But, assuming that the language of this part of the covenant has a more extensive meaning than I have attributed to it, have the *Taff Vale* directors broken the covenant by the conveyance of minerals to the *Penarth Dock and Harbour* for shipment? In other words, has the *Penarth* line by the lease of it to the *Taff Vale Company* become part of the *Taff Vale Railway?* It was argued by Sir *John Karslake* that if the *Taff Vale* directors had made a new branch and conveyed goods for shipment to some other dock than the *Bute Dock*, it would not have been a breach of covenant. But I cannot agree in this view of the covenant. Whatever doubt may be suggested as to its proper construction there can be none upon this point, that its object was to restrain the directors from using their own dock, and from making a branch to communicate with any other. It is impossible to avoid the impression that the *Penarth* lease was taken by the *Taff Vale* directors as the means by which they proposed to extricate themselves from a covenant which they may have thought pressed too hardly upon them. But whatever their motive may have been it cannot affect the construction of the covenant. I cannot consider the *Penarth Railway* as "a part or branch" of the *Taff Vale Railway*, and therefore as the shipments and the unshipments must, to come within the covenant, be from or to the *Taff Vale Railway*, I think upon the proper construction of the covenant there has been no breach of it by the Appellants, and that the judgment of the Court of Exchequer Chamber ought to be reversed.

LORD COLONSAY:—

My Lords, I quite agree with the opinion which has been stated, that there is no difficulty upon the point as to whether the covenant in question was *ultrà vires*, and also that there is no difficulty

1873

DIRECTORS,&C. OF TAFF VALE RAILWAY CO. v. MACNABB.

upon the point as to the covenant being void as being in restraint of trade.

The difficulty in the case arises upon the construction of the covenant, and especially that section of it, as set forth in the case, which has reference to the conveyance of minerals and other goods, and the particular limitation which is to be put upon the broad terms of that covenant. That there must be some limitation put upon them, I think is unquestionable, and I do not find that that is doubted by any of the Judges who in either of the Courts below, have expressed their opinions in this case. The words as they stand, if read in their full and broad sense, would lead to very extraordinary results. They would come to this—that so often as any minerals or other goods which shall be conveyed or transported upon or along the said *Taff Vale Railway*, or any part or branch thereof, shall be shipped or unshipped, loaded or unloaded, into, upon, or out of "any vessel" in the dock or basin now belonging to the railway company, "or in any basin, dock, canal, or cut whatsoever, other than the said *Bute Ship Canal*," or one of the docks, basins, or cuts connected with it, the railway company shall pay all the dues as if those goods had been shipped in the dock or ship canal of the Respondents in this case.

Now, my Lords, if that were to be the construction, what would it lead to? The words are "upon or along the said *Taff Vale Railway*, or any part or branch thereof." It is part of the case, as it is put before us, that the "railway is in communication at different points thereof with the *Newport, Abergavenny, and Hereford Railway*, the *Brecon and Merthyr Tydfil Railway*, and with the *South Wales Railway*, as well as with the *Rhymney Railway;* and the Defendants have received for carriage and transmission large quantities of goods which, after having been conveyed by the Defendants along some part of the said *Taff Vale Railway*, have been, by means of one or other of the said railways and of the other railways with which they are connected, conveyed to *Milford Haven, Swansea, Birkenhead, Newport, Southampton*," and other places on the sea coast for shipment, and have there been shipped and loaded in ships and vessels in basins, docks, or cuts other than the said *Bute West Dock*. The Defendants have never paid any dues upon those goods. I think it is impossible to suppose that

the words I have read from the covenant were intended to cover such cases as are here mentioned. If they were held to do so, it would lead to very extravagant results with regard to the traffic interchanged with other railways. And there is also another extravagant result to which it would lead. Suppose goods were carried, even into *Cardiff*, which were not at the time intended to be shipped, but which the parties who had possession of them and had stored them there afterwards chose to ship, changing their views as to the disposal of the goods, perhaps after an interval of twelve months, those words are wide enough, if read in their broad sense, to subject the railway company to dues upon those goods.

All of those are extravagant propositions, and I am led to the conclusion that it is necessary to put some limit upon this covenant. What the limit to be put upon the covenant is to be is the difficulty. Upon that point I find that the Judges in the Court below have varied very much in their opinions. The limit put upon this covenant by the Judges in the Court of Queen's Bench is different from that put upon it by some of the Judges in the Court of Exchequer Chamber. It must therefore be looked upon as a matter of considerable difficulty.

It appears to me, my Lords, that the true construction is very much that which has been put upon the covenant by the Court of Queen's Bench and by Mr. Baron *Bramwell*, which construction practically came to the same result (although the two are differently expressed) with that which has been put on it by my noble and learned friend who has just spoken.

I observe, indeed, that one of the Judges in the Court of Exchequer Chamber has suggested various difficulties connected with this covenant. [His Lordship referred to different passages in a judgment in the Court below, and said he did so to shew what a great difficulty there was in fixing any particular construction upon this covenant.] We must endeavour to get at the true construction by looking at what was the condition of matters at the time when the covenant was entered into, what were the prospects of the parties in regard to it, and what were the particular objects sought to be attained by the different provisions which were introduced into it.

Now, excluding the idea that goods which have passed along any

1873

DIRECTORS, &C. OF TAFF VALE RAILWAY CO. v. MACNABB.

part of the *Taff Vale Railway*, wherever destined to, if they are to reach the sea coast, are within this covenant, I think it is pretty clear that it was intended to meet the case of the *Taff Vale Railway* directors conveying goods by a part of their own main line, or a branch of it, to a place where they might be shipped at a dock of their own, and shipping them there instead of in these *Bute Docks*. If they had a dock themselves near, it is excluded, and any other dock or basin whatsoever is also excluded for the same reason. I think that is the only reasonable limit that we can put upon these words. If the *Taff Vale Railway* directors had extended their branches so as to go to any other part which would have been injurious to the objects which the Plaintiffs sought to secure by this covenant, that case might have come within the covenant; but that the covenant did not contemplate the case of goods going over some part of the *Taff Vale Railway*, and then passing to another railway and going by that other railway to another port or place, I think is clear.

I think that there is a covenant as to the keeping of books and accounts which makes that very clear. It provides that the railway directors are to keep accounts of all the goods shipped, and "the tonnage measurement of all and every such ships, boats, barges, craft, and other vessels upon or into, or out of or from which" any minerals shall be shipped or unloaded, and such books and accounts are to be kept at *Cardiff*. How could they keep such books and accounts with reference to goods passing along part of their railway on to another railway, and so on to a distant port of shipment?

But, farther, I think the covenant requiring the Defendants to use their endeavours to have traffic brought to the *Bute Ship Canal* or *Docks* at *Cardiff* has also a bearing upon this point. If the railway company was liable for the whole of the dues upon all goods within this main provision, if liable for the whole rates upon these goods, whether they were shipped in the *Bute Ship Canal* or not, I do not see any advantage in requiring that the directors shall do their best to bring traffic there. Yet for that the clause distinctly provides.

"The Port of *Cardiff*" is said to be a wide term. It comprehends *Penarth*, and therefore it is said they are evading the

covenant here, and evading the other one also, by shipping goods, or letting goods be shipped or landed and conveyed from *Penarth*. But if this covenant is meant to apply to goods for the dues of which the railway company is not made liable, then it is clear that there is some place or other upon the sea coast and some place which may be truly described as "at or near the Port of *Cardiff*," for shipment at which the railway company was not to be liable for dues. The directors only stipulated by this covenant to use their endeavours to get the traffic carried to the *Bute Docks;* and therefore the question comes to be whether this condition of matters which has now arisen at *Penarth* is that condition of matters which subjects them to the provision as to the liability for dues. What is the reason why they should be liable for dues under one of these covenants, and only bound to use their endeavours under another? It must be that that other covenant has reference to some other place than one to which they have a branch or main line. That being so, I think it follows that unless it can be made out that they have now a line or branch to *Penarth* the Plaintiffs cannot succeed.

The judgment of the majority of the Judges in the Court of Exchequer Chamber assumes that for the purposes of this case the *Penarth Railway* is truly a branch of the *Taff Vale Railway*. Now that is a view which I cannot hold. The only reason given is, I suppose, that the *Taff Vale Company* had taken a lease of it. But it is not the same railway. The *Penarth Railway* is a parliamentary entity of itself. The *Taff Vale Railway* is another—they are two separate things The *Penarth Railway* cannot be a branch of the *Taff Vale Railway*. You could have no branch of the *Taff Vale Railway* except what was made such by authority of Parliament. Therefore the two are totally distinct railways, and I cannot hold to the view that because the *Taff Vale* directors have taken a lease of the *Penarth Railway*, and because that lease extends over a long period, therefore the *Penarth Railway* has become a part of the *Taff Vale Railway*. I do not see that it is contended that it would have been so if it had been a short lease And I do not see that the fact of its being a long lease makes any difference. As I have said, they are separate entities, and I there-

1873

DIRECTORS,&C. OF TAFF VALE RAILWAY CO. v. MACNABB.

fore hold that this *Penarth Railway* is not any "part of the *Taff Vale Railway*, or branch thereof."

I have been unable to bring myself to the conclusion that this *Penarth Railway* is a part or branch of the *Taff Vale Railway*, or that the covenant extends to goods carried for shipment by a railway which is not a part or branch of that *Taff Vale Railway*. The words "any goods carried on part of the *Taff Vale Railway*" would be satisfied by this. But goods coming from *Cardiff* into the *Bute West Dock*, or apparently to be shipped at the *Bute West Dock*, though not shipped or put on the railway at the main western extremity of the line, but put upon a branch of it, would be within the covenant. That would satisfy the words of the covenant. Upon the whole, my Lords, I do not think that there are sufficient grounds here for holding the railway company liable for the demand now made upon it.

LORD CAIRNS:—

My Lords, this case is one of very great importance to the parties interested in it, and it is unnecessary to say that it is one which appears to me to be of very considerable difficulty, because your Lordships will observe that it has already undergone the scrutiny of eleven learned Judges, and of these eleven, five have been in favour of the Plaintiffs in Error, and six in favour of the Defendants in Error. Not only is there a difference of opinion among them as to the parties for whom judgment should be entered in the action, but there is a greater divergence of opinion than I ever before remember to have seen as to the construction of this covenant, not merely between the Judges who take different views as to the result, but among those who agree in their views as to that result.

I do not propose to read the covenants at length, but I will direct your Lordships' attention to the various constructions which have been put upon the third covenant, which is the one that presents the principal difficulty in the case.

There is one construction according to which you would read that covenant as if it implied (I will state it, rejecting all superfluous words) that if goods carried over any part, however small,

of the *Taff Vale Railway*, should be afterwards shipped in any dock whatsoever, the dues should become payable; that is to say, if the goods passed over half a mile, or any portion out of the whole length of the *Taff Vale Railway*, and were afterwards shipped in any dock whatsoever in the kingdom, the dues should become payable to the *Bute Trustees*. As to this construction, I may mention that none of the learned Judges to whom I have referred has adopted it, though it was put forward, and, as I understood, pressed in the argument at the Bar. Your Lordships will observe that if this construction were adopted, it would get rid altogether of any question whatever as to a limit of the covenant, and would make it absolutely and entirely unlimited. But if this were to be adopted as the construction of the covenant, I own that it appears to me that it would raise, in a very grave form, the question of the validity of the covenant itself, having regard to the powers which were given to make the lease in question. I will not read to your Lordships the parliamentary power which was given to the railway company (a body otherwise not possessing the power) to take a lease of the *Bute Docks;* but as I myself read that parliamentary power, it appears to me that a covenant so wide, so extensive, so unconnected with the *Bute Docks*, so unnecessary for the purpose for which the parliamentary power was given, would, to say the least of it, be extremely questionable as to whether it was *ultrà* or *intrà* the *vires* thus given to the railway company.

But, my Lords, I do not dwell longer upon that because it appears to me that this is a construction which cannot be adopted, inasmuch as virtually it would reduce not only this covenant but one of the other covenants to an absolute impossibility. Neither the railway directors nor the *Bute Trustees* could ever tell whether goods which had passed over some portion of the railway would afterwards come to be shipped at some of the remote and distant ports of the kingdom, they never could tell how many goods were so shipped, or what were the dues that were to be payable in respect of them, they never could ear-mark the goods, or follow them, or trace their history, as they passed through the different ramifications of the various railways of the kingdom. The question would arise—shipped at any dock at what time? Might it be at any period however remote from the period of their transit over

1873

DIRECTORS, &C. OF TAFF VALE RAILWAY CO. v. MACNABB.

the railway; or how far must the two things be connected together, namely the transit over a portion of the railway and their shipment at the dock. The directors are required by a later covenant to keep an account at *Cardiff* of the goods shipped in any other "dock, basin, canal, or cut as aforesaid," referring to the former covenant. How would it be possible for the directors to keep at *Cardiff* an account of goods which might pass at some period over a mile or some small portion of their railway and afterwards be shipped at one of the outports, or at some remote dock in the kingdom. The covenant would be in point of fact impossible, and the construction is one so unwarranted in reason that I do not wonder that none of the learned Judges of the Court below adopted it in his judgment.

Passing, therefore, from this general and unbridled construction of the covenant, your Lordships are driven to find a limit for the general words of the covenant in some other way. Now I would ask you to observe what are the limits of the covenant that are proposed according to different constructions. I will take, first, the limits that are proposed by the learned Judges who are in favour of the directors, and who think that the judgment should be entered for them.

Mr. Justice *Blackburn*, as I understand his judgment, proposes that the covenant should in substance be construed thus, that it should mean "any other dock close by the *Bute Dock*, and of the same kind." My Lords, upon that construction I ask what is the meaning of "close by"? Who is to determine it? If those words had been expressed in the covenant would it have been possible to give them an intelligible and definite meaning? Then who again is to say whether the dock is of the same kind, and what is to constitute a material difference, and to what extent, of one dock above another? But with regard to all I observe the words of the covenant are "any other dock," and by what authority are we to introduce those farther words "close by and of the same kind"?

Turning from the suggestion of Mr. Justice *Blackburn* to one of Mr. Justice *Mellor*, I find even more difficulty in adopting it. He proposes that the general words, "any dock," should be read as if they meant this: "Any new dock constructed by the *Taff Vale Railway Company* so as to be an evasion of the covenant." My

Lords, anything more ambiguous, more unlike the reducing of a covenant to precision, I cannot imagine, and I may observe that introducing the element that the dock must be constructed by the *Taff Vale Railway Company*, might, in a case which clearly would come within the spirit of the covenant, altogether defeat its operation. But it is sufficient again to say that there are no such words as these to be found in the covenant, and I know of no authority for introducing them.

Mr. Baron *Cleasby* proposes to limit the covenant thus. He proposes to read in the words "at *Cardiff* town" at *Cardiff* proper: that is to say, not at *Cardiff* port, but at *Cardiff* town, so that the words would run "any dock at *Cardiff* town." But I can find no principle of construction which will justify the introduction of those words, any more than of the other words I have referred to. Those constructions would not, any of them, suit the purpose of the trustees, but I have adverted to them for the purpose of saying that I am unable to adopt them as the *ratio decidendi* of the present case.

Passing over for the moment the opinion of Mr. Baron *Bramwell*, and turning to the opinions of those learned Judges who think that the judgment ought to be entered for the trustees, I find that the view of Mr. Baron *Channell* is this: He proposes that the words "any other dock" should be modified thus, "any other dock at or near *Cardiff* under the control of the *Taff Vale Railway Company*." Now here, again, I ask, who is to say what is a dock near *Cardiff*? Would it be possible that such a covenant could have effect given to it? Again, what is to justify the introduction of the words "under the control of the *Taff Vale Railway Company?*"

The Lord Chief Baron and the learned Judges whose opinions coincided with his, and were delivered by him, read the covenant, as I understand, as if the words "shipped or unshipped" were followed by these words, "at or near the port of *Cardiff*," so that the covenant would be limited thus, "goods shipped or unshipped at or near the port of *Cardiff*." But here again, my Lords, we have the ambiguity occasioned by the introduction of the word "near," and we have the introduction of the words "port of *Cardiff*," for which, as it seems to me, there is, in point of construction, no authority whatever.

1873

DIRECTORS, &C. OF TAFF VALE RAILWAY CO. v. MACNABB.

We have thus the general and unlimited construction to which I in the first instance referred, and we have five other constructions, which I have endeavoured to enumerate to your Lordships. I am unable to adopt any one of those six constructions, and I come to the only other construction to which I have referred, and which, in my opinion, is the proper construction to be put upon the covenant. My Lords, in my opinion, this covenant is intended to describe a continuous operation; it is intended to describe the case of goods conveyed along the *Taff Vale Railway*, —that is to say, conveyed along the whole length or any part of the railway, and then shipped in any dock whatever, so that the generality of the word "dock" is limited by the fact that it must be a dock in connection with some part of the *Taff Vale Railway*. It appears to me that the parties, at the time they entered into this covenant, thought, as events have proved, incorrectly, that this would be a sufficient and a practical limit to give to the covenant—that they looked upon the *Taff Vale Railway*, the railway with which they were dealing—as a railway which had one outlet and might have more, to the seaboard, and they considered that if they provided that goods which thus, by means of the *Taff Vale Railway*, reached the seaboard, were intercepted and made to pay dues, their aim would be accomplished.

My Lords, this is the construction adopted by Mr. Baron *Bramwell*, and in which I entirely agree. Your Lordships will observe that it has, I will not say the merit, but the requisite, that it complies with the rule of construction which forbids you to introduce words unless you are absolutely compelled so to do by the context. It takes the words as it finds them; it leaves the words "any dock" to be perfectly general, but it controls them by describing the continuous operation to which I have referred.

The question which then remains is, is the *Penarth Railway*, under the circumstances under which it was made and the circumstances under which it was worked, "the *Taff Vale Railway*, or any part or branch thereof," within the meaning of the covenant? I do not adopt the view of Sir *John Karslake*, who contended that the words "any branch" would only apply to the branches then existing, and would not include future branches of

the *Taff Vale Railway*. In my opinion the words "the *Taff Vale Railway*, or any part or branch thereof," would include any future branch, or any future extension, or any future addition to the *Taff Vale Railway*. But it appears to me that the *Penarth Railway* is not a part, nor a branch of, nor is it an addition to, the *Taff Vale Railway*. No doubt it is worked by the *Taff Vale Railway Company;* but the words of the covenant do not point to the company, but point to the *Taff Vale Railway*, as a thing in nature capable of ascertainment, as the proper and legitimate description of that which has a legal existence and a proper legal definition.

My Lords, I think that your Lordships have no right to depart from that which is the just and natural meaning of the term "the *Taff Vale Railway*" and to hold it as equivalent to denoting, according to a loose and popular expression, railways in connection with or worked by the *Taff Vale Railway Company*. My Lords, the result is, that in my opinion judgment must be entered for the Plaintiffs in Error in the case.

My Lords, I cannot help feeling some regret at the result at which I am obliged to arrive. It appears to me that if the parties to the arrangement, which terminated in the lease of 1849, had foreseen the events which have since happened, it would have been required on the part of the trustees that the covenant should extend and be made to cover those events, and that that demand or requirement would at that time have been willingly acceded to by the *Taff Vale Railway* directors. It appears to me that, by what has been done, the Plaintiffs in Error have departed, in a clear and striking manner, from the good faith of the arrangement which was made by this lease, and from the good faith of the covenants contained in it. But they have, in my opinion, kept themselves free from the obligation of the letter of the covenants, and that is all your Lordships have to deal with, and, therefore, in my opinion, judgment must be entered for them.

Upon the question of costs being mentioned,

LORD CAIRNS said, this is not the case of an ordinary appeal, but is a case analogous to, if not actually, Error brought under the *Common Law Procedure Act*, and, therefore, all your Lordships

1873

DIRECTORS, &C. OF TAFF VALE RAILWAY CO. v. MACNABB.

have to do, if you are of that opinion, is to direct that judgment be entered for the Plaintiffs in Error.

The following Order was afterwards entered upon the Journals :—

"That the judgment given by the Court of Exchequer Chamber, reversing the judgment given in the Court of Queen's Bench, be reversed: That the judgment of the Court of Queen's Bench be affirmed, and that the record be remitted back to the Court of Queen's Bench to the end that execution may be had thereupon in such manner as if no such judgment of reversal had been given by the Court of Exchequer Chamber: That the *Taff Vale Railway Company* be restored to all things which the said company had lost by reason of the judgment of the Court of Exchequer Chamber."

Lords' Journals, 9th May, 1873.

Solicitors for Appellants: *Field, Roscoe, Field, & Francis.*
Solicitor for Respondents: *F. S. Gosling.*

THE LIQUIDATORS OF THE IMPERIAL MERCANTILE CREDIT ASSOCIATION } APPELLANTS;

AND

EDWARD JOHN COLEMAN AND JOHN WATSON KNIGHT . . . . . } RESPONDENTS.

1873
April 29;
May 1, 2, 9.

Director—Fiduciary Character—Declaration of Interest—Partner.

A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company.

So, if, acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company.

Where the articles of a joint stock association declared that if a director had any interest in a contract proposed for acceptance by the association, he should declare his interest, or his place as director should be vacated, and that having declared it he should not vote on the proposal:—

Held, first, that "declare his interest" meant declare the nature of his interest, and that the words were not satisfied by a mere declaration that he had an interest in the matter:

And, secondly, that the vacating of the seat would not prevent the contract itself from being treated as one made for the benefit of the association, for that the rule of equity would apply to such a case in addition to the penalty specially mentioned by the article of association.

In a joint stock association created for the purpose of carrying into effect loans and other financial operations, *C.* (who carried on business as a stock-broker) was a director. An article of the association required that if a director "contracts with the company, or is concerned in, or participates in the profits of any contract with the company, or participates in the profits of any work done for the company, without declaring his interest at the meeting of directors at which such contract is determined on, or work ordered," his office of director should be vacated. The article farther required that he should not vote on such contract or work. *C.* had entered into an arrangement with *P.* to "place" the debentures of a railway company for a commission of 5 per cent. *C.* at a meeting of the directors, without mentioning his arrangement with *P.*, but merely declaring that he had an interest in the transaction, proposed to the association that it should undertake to "place" these debentures at a commission of 1½ per cent. The proposal was adopted, and debentures to a very large amount were "placed" by the association:—

Held, that *C.* was liable to account to the association for the difference between the two amounts of commission, so far as concerned the debentures which had been actually placed by the association.

The liability of the director had been declared by *Malins*, V.C., and the

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* COLEMAN.

relief prayed for by the association had been granted with costs. His Honour's decree was, on appeal to the Lord Chancellor, reversed with costs. On appeal to this House, the order of the Lord Chancellor was reversed, but the original decree being varied in some of its details, no costs were given, but the case, with a declaration, was remitted to the Court of Chancery to do what should be just in accordance with the decision of this House.

C. had a partner, *K.*, who was not in any way connected with the association; the transaction, however, had been a partnership transaction:—

Held, that the partners were liable, jointly and severally, to make good to the association the profits which it ought to have received in the increased amount of the commission.

THIS was an appeal against a decision of Lord Chancellor *Hatherley*, by which a previous decision of Vice-Chancellor *Malins* had been reversed.

The Respondents carried on business in partnership as stock-brokers under the style of *Knight & Coleman*, and acted in that capacity for Messrs. *Peto, Betts, & Crampton*, and also for the *London, Chatham, and Dover Railway Company*, for which *Peto & Co.* were contractors.

The facts of this case are fully set forth in the report in the Court below (1), and the following summary of them is all that is necessary here.

In the early part of January, 1864, the *London, Chatham, and Dover Railway Company* was desirous of raising money on debentures and shares (being authorized thereto by private Acts of Parliament) for the purposes of an extension line called the *Greenwich and Woolwich Line;* and *Peto & Co.*, having an interest in the transaction, entered into communications with *Knight & Coleman* on the subject. On the 4th of January, 1864, *Coleman* wrote a letter to *Peto* in which he said, "If the following arrangement meets with your approval, we should like to proceed at once with the affair. I can arrange to place the whole of the *B* shares and debentures for a commission of 5 per cent. in cash, and 5 per cent. in *A* shares, to be paid as and when the deposits are paid into the company's bankers." On the 5th of January, 1864, *Peto* wrote in the name of his firm to *Coleman*, "to express to you our assent to the terms contained in your note for the issue of the *Greenwich* and *Woolwich* capital."

(1) Law Rep. 6 Ch. Ap. 558.

In March, 1864, there was incorporated a company called "*The Imperial Finance Company, (Limited),*" of which *Coleman* was a director. *Thomas Fraser Sandeman* was its manager. In June, 1864, it was agreed that this company was to unite with another company which bore the name of "*The Mercantile Credit Association, (Limited),*" of which *Henry James Barker* was the manager, and the two when thus united were to bear the name of "*The Imperial Mercantile Credit Association, (Limited).*" Of this united association—the objects of which comprised, among others, "the negotiating loans of all descriptions, and the transacting any business of a capitalist,"—*Coleman* became a director. There was a committee of the association to which the consideration of its affairs was at first specially entrusted, composed of persons selected from the directors of each of the two companies. *Coleman,* though a director, was not one of this committee.

On the 7th of June, 1864, *Coleman* laid before the committee the following

"Proposal of Messrs. *Knight & Coleman.*

"*Imperial Mercantile Credit* to undertake to place £356,300 6 per cent. debentures (five years to run) of *Metropolitan Extension, Eastern Extension* of *London, Chatham, and Dover,* and £535,000 6 per cent. first preference shares. Commission on debentures 1½ per cent. Ditto on shares, 3 per cent."

Coleman saw *Sandeman* and *Barker,* who were still acting as managers for the recently united association, and (as it was alleged by him, but denied by them) shewed them the letters between himself and *Peto.* The committee passed a resolution to recommend the proposal to the board of directors. Accordingly, on the 10th of June, the proposal and the resolution were brought before the board. *Coleman* was present as a director. Before it was discussed, *Coleman* stated that he was interested in the sale of the debentures and shares, and offered to leave the room while it was under discussion; but the chairman (Mr. *Chapman*) said that it was unnecessary for him to do so. A question arose as to whether *Coleman,* being a director of the association, and having an interest in the sale of the debentures, the association could enter into the transaction proposed.

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

By the 83rd article of association it was provided that,

"The office of a director shall be vacated

"1. If he holds any other office or place of profit under the company.

"2. If he becomes bankrupt or insolvent.

"3. If he contracts with the company, or is concerned in, or participates in, the profits of any contract with the company, or participates in the profits of any work done for the company, without declaring his interest at the meeting of the directors at which such contract is determined on or work ordered, if his interest then exists, or, in any other case, at the first meeting of the directors after the acquisition of his interest; and no director so interested shall vote at any meeting, or on any committee of the directors, on any question relating to such contract or work; but this article shall not apply if his interest is only that of a member, other than a director or other officer, of a company which contracts with or does work for this company, or is concerned in, or participates in the profits of any contract with this company."

Mr. *Morris*, the solicitor of the company, being consulted on this question, said that if the director at the time of any business being submitted to the board, declared his interest in it, the association could enter into the business. The board thereupon discussed the proposal, and passed this resolution: "The committee appointed at the last meeting presented their report upon Messrs. *Knight & Coleman's* proposition, which they have so far modified as to recommend the £356,300 debenture stock of the *Metropolitan Extension (Greenwich and Woolwich)* be taken up at a commission of 1½ per cent. The proposal, as presented by the committee, was accepted." The money was paid through *Knight & Coleman*, who retained for their share of the commission £12,470 10*s.*, which, with the sum of £5344 10*s.* retained by the association, amounted to £17,815, or 5 per cent. on the whole £356,000. It appeared, however, that a part of the whole £356,000, amounting to £35,000, was not placed by the association, but actually sold by the company itself. The transaction turned out to be a loss, and when the association came to be wound up, the liquidators having discovered the contract with *Peto & Co.*, filed a bill against *Knight & Coleman* to make them liable for the whole loss, and to compel

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

them to pay over for the benefit of the association the £12,470 10*s.* which they had received as commission for placing the debentures. The bill was afterwards amended and confined to the latter demand, and also to so much of a sum of £6230 as *Knight & Coleman* might obtain from *Peto & Co.* (who had since become bankrupts) under an agreement for commuting their portion of commission on the placing of the shares.

On the hearing before Vice-Chancellor *Malins* he made an order directing payment by *Coleman & Knight* of the £12,470 10*s.* with interest at 5 per cent., and of whatever might be recovered by them from the estate of *Peto* in respect of the £6230. *Coleman & Knight* appealed, and Lord Chancellor *Hatherley* reversed this decision, and ordered the bill to be dismissed with costs. This appeal was then brought.

Mr. *Brown*, Q.C., and Mr. *Jackson*, Q.C., for the Appellants:—

Under the provisions of the 83rd article of association, even supposing *Coleman* to have done all which that article required (which is not admitted) he could only thereby be freed from liability to lose his seat as a director; but that did not in any way relieve him from the effect of the rule of equity which treats a director as a trustee for the company, and binds him to account for any profits which he has made in its transactions. The 88th section of the *Companies Clauses Act* of 1845 (8 & 9 Vict. c. 17) is the original of the 83rd article of association here, and both alike leave the principle of Equity untouched, and deal only with the loss of the seat of a director. It is true that in *Foster* v. *The Oxford and Worcester Railway Company* (1) a distinction of this sort was taken, and the contract itself was not avoided, though the director lost his seat by being concerned in it. But, as explained in *The Aberdeen Railway Company* v. *Blaikie* (2), the contract, though it might be good at Common Law, could not be enforced in Equity. In the latter case *Blaikie's* character of trustee was recognised as so directly affecting the matter that it was decided that the question whether there was fairness in the contract itself, or even profit to the company arising from it, could not be entered into; but it was held that the contract itself could not be enforced in Equity,

(1) 13 C. B. 200; 22 L. J. (C.P.) 99. (2) 1 Macq. Sc. Ap. Cas. 461.

17 June 167
(a) See W.N. (1870) 103.

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

and Lord Chancellor *Cranworth* and Lord *Brougham* there acted expressly on that principle. But however that may be as to third persons, it is clear that any person concerned in making the contract, if holding a fiduciary character in relation to one of the contracting parties, must be accountable to that party. As to his interests it is void. In *Pickering's Case* (1), where the contract, though apparently made between two individuals alone, was really made for the company by one while he was director of his company, and though a large sum of money had been paid by the company on account of the contract before the winding-up order, it was held that the contract itself could not be enforced against the company. And this was really in accordance with a case of *Ex parte James* (2), where the purchase of a bankrupt's estate by the solicitor to the commission was set aside, and Lord *Eldon* would not permit the solicitor, even after divesting himself of the character of solicitor, to bid upon the resale. So in *Benson* v. *Heathorn* (3) Vice-Chancellor *Knight Bruce* compelled the Defendant, who had been director of a company, to refund to the company a sum of £160 which he had made as profit on the sale to the company of one of his own vessels.

18 Eq 535.

It is not enough to say that the directors were sufficiently informed to be put upon inquiry. They ought in such a case to have the fullest information given to them, and ought not to be driven to inquiry: *Fawcett* v. *Whitehouse* (4), and *Hichens* v. *Congreve* (5).

The disability of a director to make such a contract as this arises from his fiduciary character. The mere disclosure of the fact that he had an interest without more would not relieve him from the obligations he was under on account of this fiduciary character. The words of the 83rd article are not satisfied by such a vague declaration. His statement about his having an interest was incomplete and insufficient. He should have said what was his interest. He said nothing of the kind. All that he said was, that he was interested. That was not sufficient within the plain meaning of the 83rd article. There was no doubt that if the

(1) Law Rep. 6 Ch. Ap. 525.
(2) 8 Ves. 337.
(3) 1 Y. & C. Ch. 326.
(4) 1 Russ. & My. 132.
(5) 1 Russ. & My. 150, n.

company had known the extent of that interest the contract would not have been accepted. No one had been properly informed on the matter. If the managers, *Sandeman* and *Barker*, had really known the contents of the letters, that would not have affected the question. They were not, as Lord Chancellor *Hatherley* fancied, members of the temporary board. They were only the servants of the association. The directors were the persons who were entitled to be informed of the letters. Here, however, even the managers themselves declare that they had not been shewn these letters, while the directors had not the least idea of their existence. Yet these letters constituted an arrangement which amounted to this, that the profit was to be for the Respondents—the risk for the association. The Respondents, the brokers, were to have 5 per cent. commission on a speculation in which all the money was to be advanced by the association, which was only to get 1½ per cent., and the person who presented this proposal to the association was one of its directors, and as such was bound not to receive a benefit for himself at the expense of the association. The principle is stated in *Ernest* v. *Nicholls* (1), and acted upon in *The Great Luxembourg Railway Company* v. *Magnay* (2); and *Chaplin* v. *Young* (3) shews that this decision dismissing the bill cannot be supported.

Mr. *Cotton*, Q.C., and Mr. *Stewart Ferrers*, were for the Respondent *Knight*.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Kay*, Q.C. (Mr. *Thesiger* was with them), for the Respondent *Coleman*:—

The main question here depends on the construction of the 83rd article of the association. On that it is contended for the Respondents that *Coleman* did all that he was required to do, and that, having satisfied the requirements of that article, he is freed from all farther liability; that there was no fiduciary relation between him and the association, except so far as that article might create one, and that he has complied with its conditions and freed himself even from that qualified relationship. Then it is contended

(1) 6 H. L. Cas. 401. 3 Jur. N.S. 919 (2) 25 Beav. 586. 4 Jur. N.S. 839
(3) 33 Beav. 414.

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* COLEMAN.

that as to *Knight* there is no pretence for holding him liable at all. He stood in no position of a fiduciary character to the association; he was not a director of it; he did not hold shares in it; he took no personal interest in it; he knew nothing of it. He is therefore entitled to have this bill, as against him, dismissed.

As to *Coleman*, the 83rd article exempts him from any liability to this suit. That article was one really made in favour of a director; its object was to define exactly what he was to do, and to prevent him from being subjected to any indefinite liability if he should happen to have an interest in any of the business transactions of the company. If he had such an interest he was required to declare the fact, and having made that declaration he was not to be allowed to vote on the matter. These were clear and intelligible provisions, and he has fully satisfied them. The only object of the article, as shewn by the provision against his voting, was that he should not be in a position to give wrong advice to the company, and enforce it by his vote, on a matter in which his interest might bias his opinion. That object being secured, the article relieved him from all other consequences. The closing words of the article shewed that an interest of a particular sort had been contemplated as likely to exist in a director, and that had been provided against; and that being done nothing farther was required. The general rule as to fiduciary relations had therefore no application to this case.

But no such relation existed between *Coleman* and the company. He was known to be a stockbroker; he was known to act as a stockbroker for *Peto & Co.*, whose connection with the railway company was likewise well known. In fact, therefore, there was nothing as to which the company could have been misled, even if he had not said anything about his interest. But he did say it, and literally complied with all that the 83rd article required. [LORD CAIRNS:—He declared that he had an interest; was that enough? LORD CHELMSFORD:—He might have had an interest to the extent of being a broker. Was not the bare declaration that he had an interest, he being a broker, likely to mislead?] It was not. It was a declaration of an existing interest; it put the directors on inquiry. Having made the declaration which the 83rd article required, he thereby subjected himself to the inquiry what that

interest was; what its nature, and what its extent. But the directors did not think it necessary to make any farther inquiry; and though *Coleman* offered to leave the room he was told not to do so. But he did not vote, nor even speak on the subject. He had therefore done all that the 83rd article required, and abstained from doing anything that it forbad, and was discharged from all farther liability. All that the directors desired to consider was whether the proposal, as submitted to them, was one which they ought to accept; they decided that it was, and entered into the contract. They could not now insist on keeping all that they had got by the contract, and so affirm the contract, and yet treat it as if there had been no contract with them, and claim the profits obtained from it by another person.

All the cases referred to as shewing the liability of *Coleman* were cases where the fiduciary character really existed. *Fawcett* v. *Whitehouse* (1) and *Hichens* v. *Congreve* (2) were clearly of that sort. So was *Tyrrell* v. *The Bank of London* (3); *Tyrrell* there being in fact the solicitor of the company. It was the same with *The Aberdeen Railway Company* v. *Blaikie* (4), and *The Great Luxembourg Company* v. *Magnay* (5). Again, in *Benson* v. *Heathorne* (6), the director was specially entrusted with the duty of making the sort of contract for the company out of which he sought, at the expense of the company, to make a profit for himself. And there, too, he actually charged commission on the sale of the vessel, thereby affecting to be dealing as on the part of the company with the property of a stranger. Not one of these circumstances existed here, and therefore the rules which were applicable in those cases were inapplicable here.

The decree of Vice-Chancellor *Malins* now sought to be restored and affirmed is wrong in substance and in form. It charges the Respondents as with the whole amount of commission to be derived from the placing of all the debentures, whereas there was a large portion of them, amounting to many thousands of pounds, which were sold in the market by the railway company itself. Again, the Respondents were charged with what they were to receive

(1) 1 Russ. & My. 132.
(2) Ibid. 150, n.
(3) 10 H. L. C. 26.
(4) 1 Macq. Sc. Ap. 461.
(5) 25 Beav. 586.
(6) 1 Y. & C. Ch. 326.

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

from Messrs. *Peto*, though it was possible they might never receive a farthing of it. And then they were charged with 5 per cent. interest, which it was not the practice of the Court of Chancery to give unless there was fraud established against the party, and fraud was not alleged here.

Mr. *Brown* replied.

LORD CHELMSFORD:—

My Lords, the question in this case is whether the Respondents are bound to account to the Appellants for the profits by way of commission realised by them with respect to certain debentures of the *London, Chatham, and Dover Railway Company*. These profits consist of a sum of £12,470 10*s*. actually received by the Respondents, and of a sum of £6230 remaining to be paid to them. [His Lordship here stated fully the facts of the case.]

A bill was filed in the name of the association praying that Messrs. *Knight & Coleman* might be decreed to account to the association for the sum of £12,470 10*s*., and the farther sum of £6230, on the ground that they were profits derived from the application of the funds of the association, of which Mr. *Coleman* was in the fiduciary position of a director, and could not, therefore, make a profit to himself out of that trust and employment.

"The principle," as the Lord Chancellor said in his judgment in this case, "is firmly and well established, that a person holding a fiduciary position with regard to a company cannot obtain for himself a benefit derived from the employment of the funds of the company in any matter in which he, the director, as such director, may happen to be engaged." The principle was, of course, not disputed by Messrs. *Knight & Coleman*, but they contended that one of the articles of the association removed the transaction in question from the range of its application. The article upon which reliance is thus placed is the 83rd of the articles of association, and is in the following terms:—[His Lordship read it, see *ante*, p. 192.] This article, no doubt, contemplates the case of a director deriving profits from a contract in which the company is interested; but provides that if he participates in such profits without declaring his interest his office of director shall be vacated; but if he does

declare it the only condition imposed upon him is, that he shall not vote upon the question relating to the matter in which he is so interested.

It is contended that Mr. *Coleman* complied with the conditions of this article, because, on the 10th of June, 1864, when a recommendation, by the committee, of the proposal as to placing the debentures of the railway company was brought before the temporary board, and was accepted by that board, he stated that he was interested in the sale of the debentures, and offered to leave the room whilst the proposal for their sale to the association was discussed.

—In the Court below reliance was placed upon a fact asserted by Mr. *Coleman* in his affidavit, that he had shewn the letters of the 4th and 5th of January, 1864, which contained his proposal to place the debentures for a commission of 5 per cent., and the acceptance of that proposal, to Mr. *Sandeman* and Mr. *Barker*, the managers of the association. There was conflicting evidence on this subject. Mr. *Sandeman* and Mr. *Barker*, in their original affidavits, merely said that "they had no recollection of having seen these letters." But in subsequent affidavits they both, in the very same terms, stated that "they had had ample opportunity of reconsidering the whole matter, and were then satisfied that they never did see the letters in question." Mr. *Sandeman* was cross-examined, and it was considered that his credit was much shaken by a letter which was written by him on the 4th of November, two days after the bill was filed. I do not think I need trouble your Lordships with it. I do not see how it shews that he had sworn falsely with respect to not having seen the letters of the 4th and 5th of January. And it ought to be borne in mind that if Mr. *Sandeman* was capable of giving false testimony, he was a friend of Mr. *Coleman's*, and would therefore be more likely to swear falsely in his favour than against him. Mr. *Barker* gives the same testimony, and he was not cross-examined. If, therefore, it were necessary to come to a conclusion upon this point, I should be disposed to think that Mr. *Sandeman* and Mr. *Barker* did not see these letters.

But suppose the letters were communicated by Mr. *Coleman* to Mr. *Sandeman* and Mr. *Barker*, and suppose they had been directors

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

of the company, how would that satisfy the conditions of the 83rd article, by which *Coleman* was bound to declare his interest at the meeting of the directors at which the contract for placing the debentures was determined on? If shewing the letters to the managers would have been sufficient, then if Mr. *Coleman* had merely shewn them, but, at the meeting when the proposal was accepted, had said nothing of his being interested, he would have been in just as favourable a position under this article. In truth, the whole question depends upon the meaning to be given to the words of the article, "declaring his interest," and upon Mr. *Coleman*'s compliance or not with the conditions.

The Respondents contend that the object of the article is to prevent a director voting at a meeting of the directors when a matter in which he has an interest is to be determined upon, and that this object is sufficiently attained by the other directors being informed that such director has an interest, without his declaring the nature of it.

But it must be observed that the words of the article are not "to declare that he has an interest," but to "declare *his* interest," which seem to involve not merely the declaration of the existence of an interest but the nature of that interest. For surely when the directors are to determine whether they will enter into any contract, or order any work to be done for the company in which a brother director is interested, it may be a most important element in their consideration what the nature of the interest is which is required to be declared. For instance, in this case Mr. *Coleman* secures a commission of 5 per cent. upon placing the debentures of the railway company. He conceals the fact at the time when it ought to be disclosed, and gets the directors to take the whole risk of placing the debentures upon the association for a commission of $1\frac{1}{2}$ per cent., while for his own share of the transaction he is receiving a commission of $3\frac{1}{2}$ per cent. without any risk. If the directors had been fully informed of the real state of things, would they have accepted the proposal, and ought they to have done so as trustees for the shareholders?

It is said on behalf of Messrs. *Knight & Coleman* that *Coleman* did at the meeting all he was required to do, that Mr. *Morris*, the solicitor who attended, advised the directors that, provided a direc-

tor declared at the time of any business being submitted to the board that he was interested therein, that was a sufficient compliance with the 83rd article.

But Mr. *Morris*, in his affidavit, does not support this statement, or the argument founded on it; he states that he was present at the meeting of the temporary board. He says, "I remember a question being put to me as to whether the said association could entertain proposals for business from any of the directors, or any firm in which any director was a member, and I gave it as my opinion that by the articles of association as then framed it would be competent for the association to entertain any such proposals if the interest of the directors or their firms therein were disclosed, and everything connected with it was perfectly open and above board." And he then says, that, "neither then nor at any other time in my presence, did the said Defendant *Coleman* disclose the nature or extent of the interest of his said firm in the debentures referred to in the said proposal, and I had not then, nor at any other time until just before the institution of this suit, any knowledge or suspicion that the said Defendant *Coleman* or his firm had made any profit out of the said debentures, beyond the usual commission charged by stockbrokers to their principals for the transaction of business of that class." And Mr. *Coleman* himself, in his affidavit, although he had stated differently in his answer, shews that the advice which was given by Mr. *Morris* was that the nature of the business should be disclosed. He says, "Mr. *Morris*, the solicitor to the association, was asked whether, under the articles of association, it would be competent for the association to entertain proposals for any business from any director who was interested therein, and he having given it as his opinion that it was competent for the association to entertain such proposals, if the nature of the interest of such director were disclosed, the deponent *Edward John Coleman* did thereupon state to the board in the hearing of all those present that he was, together with the said *John Watson Knight*, interested in the said proposal, which was then being brought before the board."

It was, however, contended that Messrs. *Knight & Coleman* were known to be stockbrokers, and that, therefore, declaring that they had an interest in the transaction, conveyed all the requisite

18 Eq. 535

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION *v.* COLEMAN.

18 Eq 535

information that they were interested in that character. It was answered, however, that the commission of brokers upon placing shares and debentures varied considerably according to the varying character of each transaction; and, therefore, the knowledge that Messrs. *Knight & Coleman* were acting as stockbrokers afforded very scanty information as to the nature of their interest. Indeed, Mr. *Coleman* himself has given a complete answer to this suggestion, for in an affidavit made by him, to which I have already referred, he says:—"The undertaking such a liability as the placing of the debentures in question, amounting to £356,300, was a matter from its magnitude and character wholly beyond the ordinary business of stockbrokers, and for which there were and could be no ordinary or recognised terms of remuneration." He says "that the 'usual' broker's commission has no reference to such a matter, and it was and could necessarily only be a matter of contract between the brokers and principals engaged in such a transaction." There was, therefore, the more reason for disclosing the real nature of the transaction; and as it is almost admitted that without the protection of the article, the principle applicable to his fiduciary position would have prevented his making a profit to himself out of the funds of the association, so his non-compliance with the conditions of that article leaves him exposed to the application of the principle, and liable to refund the profit which he must be considered to have received in trust for the association.

18 Eq 537
3 Ch D 738

It was argued on behalf of Mr. *Coleman* that, if liable at all, he could only be so for half of the profit of which the partnership received the benefit. But the liability of partners who are implicated in a breach of trust (and this is an analogous case) has been held to be joint and several. It would be a strange conclusion that Mr. *Coleman*, who was the active agent in diverting the money, which belonged to the association, to the partnership funds, should not be answerable for the whole, whether his co-partner, Mr. *Knight*, was liable or not for any part of it.

It was also said that Mr. *Coleman* was entitled to have some allowance for his work and labour in introducing the business to the association. It can hardly have been seriously argued that he was to be remunerated for doing that which was contrary to his

duty, and for which, even if he had acted rightly, as a trustee he would not have been entitled to make any charge.

With respect to the Respondent *Knight*, some slightly different considerations arise. In the Courts below he joined with Mr. *Coleman* in the defence to the suit; and, as far as I collect from the report, and the judgments, he stood upon the same ground with Mr. *Coleman*, and never denied that if Mr. *Coleman* was liable he was liable with him. Upon the present appeal he separated himself from Mr. *Coleman*, and appeared by different counsel. If his liability to any extent was disputed, it was only faintly argued. But it was insisted for him, as for Mr. *Coleman*, that his liability extended only to one half of the profits derived from the transaction. Now, if Mr. *Knight* had been ignorant that the money which was brought into the partnership was money obtained by his partner by a dereliction of duty, and that it was in law the money of the association, he might have had a good defence. But he was a party to and implicated in the breach of trust. He was acquainted with the whole transaction from first to last. He knew where the money which was brought into the partnership came from, and that it could not belong to his co-partner. With all this knowledge the liability of Mr. *Knight* cannot be separated from that of Mr. *Coleman*. They are, therefore, both of them liable to refund the sum of money which was carried to the account of the partnership, *minus* a sum of £1233 15s., being 3½ per cent. on debentures amounting to £35,000 which were not placed nor guaranteed by the association, but which were sold on behalf of, and accounted for to, the railway company.

Upon this balance, I think interest at 4 per cent., and not 5 per cent. ought to be paid. They are also bound to give to the association whatever benefit, which appears to be but small, may be derived from the £6230 to be paid to them as an additional commission on the placing of the debentures.

I think therefore that the decree appealed from ought to be reversed, and a declaration made to the effect which I have mentioned.

LORD COLONSAY concurred.

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

LORD CAIRNS, having stated the facts of the case, said:—

Under the arrangement made on the 10th of June the debentures were, with a trifling exception, taken by the association; and the result was that Mr. *Coleman* having the disposal of property for the disposal of which he was to receive a large remuneration, secured that remuneration to himself or his firm, by disposing of the property to an association of which he was a trustee and director.

Now it does not admit of argument that, if there was nothing more in the case, this is a transaction which could not for a moment be supported in a Court of Equity, and that Mr. *Coleman* would have to account to the association for his profit upon the sale, which profit was in reality so much money taken by him from the association. That this would be so in an ordinary case appears to have been clearly the opinion of the Lord Chancellor, and was not indeed disputed at your Lordships' Bar.

My Lords, I observe that Mr. *Coleman* states that it was no object to him to place these debentures with the association, and that other finance companies were ready to undertake the business on the same or lower terms. It is extremely difficult to reconcile these statements with those contained in the letter of Mr. *Coleman* of the 4th of January, 1864, to Sir *Morton Peto*, which I have already read. But putting that aside, it is not the practice of a Court of Equity to inquire into the merits of a particular contract made by one who is at once buyer and seller. The Court does not permit such a contract to be made, and obliges the person who makes it to surrender any benefit he has obtained.

The main argument, however, for the Respondents was based on what is said to have taken place on the 10th of June, 1864 (when the contract with the association was made), coupled with the 83rd clause of the articles of association. Mr. *Coleman* thus describes what took place. In his answer, after stating how the proposal was brought before the meeting, he says, "The Defendant *Coleman* stated openly to the meeting that he was interested in the sale of these debentures, and offered to leave the room whilst the proposal for their sale to the association was discussed, but the chairman said it was unnecessary." I pass over what Mr. *Morris*, the solicitor

to the company, is stated to have said, the Defendant *Coleman* only alleging in his answer that Mr. *Morris* advised that a director must declare that he was interested, but in his affidavit stating that Mr. *Morris* said the nature of the interest of the director must be disclosed. It appears to me, however, that nothing that Mr. *Morris* said could alter whatever is the true meaning of clause 83.

It is to be observed that this is a clause dealing merely with the vacating the office of director. It provides that his office shall be vacated if he is concerned in a contract with the company without declaring his interest. It was said that this clause, though in terms dealing only with the vacating of the office, impliedly sanctioned the retaining of his interest by a director if he declared it. I will assume in favour of the Respondents, but without deciding it, that this is the true construction of the clause. A director, then, claiming to give validity to a contract which otherwise would be invalid must shew that he has, in letter and in spirit, complied with the provisions of the clause. Now has the Respondent done so? Did he "declare," or, as that word implies, shew clearly his interest? His interest might be anything, from the absolute ownership of the property sold, down to a right of a nominal charge on or payment out of it. Did he, then, "declare" what his intention was? Certainly he did not. A man declares his opinion or his intentions when he states what his opinion is, or what his intentions are, not that he has an opinion or that he has intentions; and so, in my opinion, a man declares his interest, not when he states that he has an interest, but when he states what his interest is.

Now was it material that Mr. *Coleman's* co-directors should know what his interest was? In my opinion it was most material. No better instance of the materiality of such a declaration could be found than in the present case. If the directors had known that without any risk to himself the Respondent was to receive 5 per cent. in cash and 5 per cent. in shares on what they, bearing all the risk, were to receive only 1½ per cent. upon in cash, can it be doubted that one of two things must have happened, either that they would have seen that the transaction was, as between the Respondent and *Sir Morton Peto & Co.*, known to be attended with risk, and would therefore have declined it altogether, or else that they would have insisted on a much larger share of the profit.

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

But then, my Lords, it was contended on the Respondents' behalf, and this appears to have had a considerable effect on the mind of the Lord Chancellor in his judgment, that although Mr. *Coleman* stated merely that he had an interest, it was open to the directors who were then present to have cross-questioned him, and to have elicited from him what his interest really was.

5 Ch D 103,

My Lords, if this had been a case in which a person standing in a fiduciary relation to another had in the presence of another stated that he had an interest, and that other was then able to ask some farther questions as to what his interest was, I should have thought a good deal of weight might be attached to this argument. But it was not to the company, or even to a general meeting of the company that Mr. *Coleman* stated that he had an interest. It was to some other persons, who were just as much in a fiduciary position as he was himself, and in my opinion it was not open to Mr. *Coleman*, if he desired to comply with the clause, merely to state to those other trustees what might have led them to make farther inquiry, but to leave it open to the chance of whether they would make that inquiry or not.

Then it was said that at all events Mr. *Sandeman* and Mr. *Barker*, the managers of the company, knew the particulars of the bargain which had been made between Mr. *Coleman* and *Sir Morton Peto & Co.* A great deal of controversy arose as to whether the evidence has made out that they really did possess that knowledge. My Lords, I think that controversy is entirely beside the merits of the case. It appears to me to be utterly immaterial even if it should be held to be proved, and I do not think it is proved, that Mr. *Sandeman* and Mr. *Barker* were made acquainted with all the details of the original contract. It is not pretended that Mr. *Sandeman* and Mr. *Barker* communicated those details to a board of directors; and if it be the case that they possessed the knowledge themselves, it only makes more remarkable and conspicuous the manner in which the directors were kept in the dark on the subject.

But then, my Lords, it is said that, after all, it was known to the whole of the board of directors that Mr. *Coleman* and his partner were brokers, accustomed to deal in negotiations with regard to shares and debentures; and that knowing that they were brokers,

the directors must have known that the interest to which Mr. *Coleman* referred was the interest of a broker, and that the interest of a broker meant the usual commission which a broker receives; and that therefore by that chain of propositions the board of directors must have known that the interest of Mr. *Coleman* was merely this—that as a broker he was to receive the usual broker's commission upon a transaction of the kind.

My Lords, the conclusion which is thus attempted to be derived from these suggestions appears to me to be an extremely violent one. The interest of Mr. *Coleman* might have been any interest whatever as well as the interest of a broker, although he himself happened to be a broker. But in truth your Lordships will observe that the whole of that argument assumes that there was a well known and settled brokerage commission which is to be understood to represent the interest of Mr. *Coleman*, and that every director must have known what that usual brokerage commission was. The whole of that assumption is cut away by the statement of Mr. *Coleman* himself, Mr. *Coleman* states: "The undertaking such a liability as the placing of the debentures in question, amounting to £356,300, was a matter from its magnitude and character wholly beyond the ordinary business of stockbrokers, and for which there were and could be no ordinary or recognised terms of remuneration. We say that the 'usual' broker's commission has no reference to such a matter, and it was, and could necessarily only be, a matter of contract between the brokers and principals engaged in such a transaction. We submit that we were perfectly entitled to make what terms with our principals we pleased." The interest, therefore, of Mr. *Coleman*, according to his own view, might have been 50 per cent., 40 per cent., 30 per cent., or any amount of interest in the property in question. The whole of the argument therefore falls to the ground.

My Lords, I arrive therefore at the conclusion, that the 83rd article affords no justification whatever upon which this transaction can be upheld, and that the general rule which I stated some time ago applies to the transaction.

But then it was contended that even if Mr. *Coleman* is liable to make good to the association any part of this money, it is only his own share of the profits which he is bound to restore; and that

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

inasmuch as he was in partnership with Mr. *Knight*, it is only that portion of the profits which as between Mr. *Knight* and himself he would have taken out of the transaction.

My Lords, I think there is no foundation for this argument. The profit on the transaction was obtained by Mr. *Coleman*, and, in the view that I take, was obtained by him as a director of the association. Whether he desired or whether he determined to reserve it all to himself or to share it with his firm appears to me to be perfectly immaterial. The source from which the profit is derived is Mr. *Coleman*. It is only through him that his firm can claim. He is liable for the whole of the profits which were obtained; and it is not the course for a Court of Equity to enter into the consideration of what afterwards would have become of those profits. I may meet the argument by a very familiar case, which occurs constantly in a Court of Equity, where a trustee, who is a solicitor, and a member of a firm, without authority, charges for his professional services and trouble, although he is a trustee. It has been held repeatedly that if that charge is made and not paid, it must be disallowed; that if paid, it must be refunded; and that which is to be refunded is the whole of the charge and not merely the share of the trustee in the profits of the concern of which he is a member.

Then it was said, on behalf, not of Mr. *Coleman*, but of Mr. *Knight*, that whatever might be the liability of Mr. *Coleman*, Mr. *Knight* was not liable in this suit, and was improperly made a party to it. My Lords, the observations which I have already made almost cover that argument also. Mr. *Knight* states very fairly that about this transaction he knew nothing—he left the whole to Mr. *Coleman;* and it is only from the statements of Mr. *Coleman* that he is able to answer the questions put to him. But Mr. *Knight* was perfectly aware that Mr. *Coleman* was a director of the association. He knew that the dealing was a dealing with the association. He knew that if the dealing could be justified and maintained it could only be by a proper compliance on the part of Mr. *Coleman* with the provisions of the 83rd article. His right, therefore, to retain any part of the money against the association must depend upon his being able to shew that Mr. *Coleman* complied with the terms of that 83rd article. That, in my opinion,

has not been shewn, and therefore Mr. *Knight* is liable for money which came to the firm, which was really the trust money of the association.

Some observations were made on the form of the decree, to which it is necessary that I should advert. It was pointed out that the decree makes Messrs. *Coleman & Knight* answerable for £12,470 10*s.*, which is reckoned as a percentage upon the whole amount of the debentures in question, whereas (I think the figures are correct; I took them down from the statement of counsel at the Bar), £35,250 of these debentures were not placed by the Appellant association, and never, in any way, found their way to that association; but were placed independently of them. My Lords, I think the decree in that respect has gone too far, and that a deduction should be made in respect of the percentage on that £35,250. The percentage to be reduced, as I took it down from Counsel at your Lordships' Bar, was, I think, the sum of £1233 15*s.*, which will bring the sum for which Messrs. *Knight & Coleman* would be answerable to £11,236 15*s.*

Then, my Lords, the decree orders the payment of interest at the rate of 5 per cent. Now, I wish to make very emphatically this statement. That is the course of a Court of Equity where a trustee has been chargeable with a misuse—still more if it be a misappropriation of trust money—or where he has been guilty of wilful misfeasance or fraud. Now, although I think that Mr. *Coleman* and his partner are answerable in this suit, still, in my opinion, I do not find in this case that there was any fraud whatever intended; and I think it right to state that, as questions of this kind always become matters of character, it appears to me that Mr. *Coleman* was under the impression, I think an erroneous one, that by doing what he did, by stating what he stated, by expressing what he expressed with regard to his interest, he had brought himself within the terms of the 83rd article, and had placed himself in a position to deal in a valid and proper way with the association of which he was a director. My Lords, I am of opinion, as I have said already, that that was a mistake and error. But at the same time it is an error which may have been, and I see no reason to say that it was not, honestly and *bonâ fide* entertained; and therefore I think the decree ought not to proceed

1873

LIQUIDATORS OF IMPERIAL MERCANTILE CREDIT ASSOCIATION v. COLEMAN.

against Mr. *Coleman* or Mr. *Knight* upon the footing of any fraud having been wilfully committed. If that is so, your Lordships will probably alter the decree by substituting the rate of interest of 4 per cent. for the rate, now standing upon the decree, of 5 per cent.

I think the decree is substantially right in giving to the Plaintiffs whatever benefit may result from the estate of *Sir Morton Peto & Co.*, and giving the right to prove against that estate.

With regard to the costs, I wish to point out to your Lordships the peculiar position in which the case stood. The Vice-Chancellor made a decree against the Defendants with costs. In my opinion that was right, and the costs ought to have followed the result of the suit. Then, my Lords, the Respondents appealed to the Lord Chancellor. In my opinion, they were not entitled to have the decree reversed, but they were entitled to have the decree varied in those respects which I have mentioned, which appear to me to be substantial matters on the decree. Therefore it would have been right, as it appears to me, to have substituted before the Lord Chancellor, for the Vice-Chancellor's decree, a decree with those variations, or to have made those variations upon the decree itself; and therefore there would have been no costs of the hearing before the Lord Chancellor. If your Lordships take that view, your Lordships will alter the decree upon the matter of figures as I have ventured to suggest to your Lordships; the original decree will stand as a decree with costs; but there will be no costs of the proceeding by way of re-hearing in the Court of Chancery, and of course, under the circumstances, there will be no costs of the hearing before this House.

Mr. *Joseph Brown*:—Perhaps your Lordships will allow me to state that we have paid Messrs. *Coleman & Knight*, under the Lord Chancellor's decree, the costs of the appeal before the Lord Chancellor.

Mr. *Cotton*:—No.

LORD CAIRNS:—My Lords, I think it is your Lordships' habit to remit the case to the Court of Chancery with the declaration which your Lordships think it right to make, and all questions of repay-

ments and re-adjustments are then disposed of by the Court of Chancery.

The following Order was entered on the Journals:—

"That the Order of the Court of Chancery of the 10th of February, 1871, complained of in the said appeal, be reversed: And it is Declared, That the decree of the Vice-Chancellor *Malins*, of the 26th of March, 1870, ought to be, and the same is, hereby varied, by omitting the words following, namely, 'Twelve thousand four hundred and seventy pounds ten shillings,' and by substituting in lieu thereof the words following, namely, 'Eleven thousand two hundred and thirty-six pounds fifteen shillings;' and also by omitting '5 per cent.,' and by substituting in lieu thereof '4 per cent.:' And it is farther Ordered, that no costs of the proceeding by way of re-hearing in the Court of Chancery be allowed: And it is also farther Ordered, that the cause be, and is hereby remitted back to the Court of Chancery to do therein as shall be just and consistent with these variations and this judgment."

Lords' Journal, 9th May, 1873.

Solicitors for the Appellant: *Ashurst, Morris, & Co.*
Solicitors for the Respondents: *Maynard & Son.*

1873
June 16.

THE REV. LUMSDEN SHIRROFF DUDMAN { PLAINTIFF IN ERROR;

AND

JOHN VIGAR . . . . . { DEFENDANT IN ERROR.

Tithes—"Tillage."

The Commissioner appointed under an Inclosure Act stated that lands in the parish were subject to a certain modus, which "extended only to the lands when occupied by the owners thereof," or by residents, but that such lands would become liable to the payment of tithes, the amount of which he specified in a schedule, when otherwise occupied, or "if converted into tillage." A resident owner built in one of his fields, then subject to the modus, a house, attached to it a garden, and planted fruit trees on the rest of the field:—

Held, that by the planting of the fruit trees there had not been a conversion into tillage so as to destroy the modus and render the land subject to the increased tithe.

Per THE LORD CHANCELLOR (Lord *Selborne*):—The conversion into tillage of any part of the land, if such conversion had actually taken place, would not, under this award, make the whole field, but only that part of it which was so converted, liable to the increased tithe.

MR. *VIGAR* was the owner and occupier of land in the parish of *Pitney*, in the county of *Somerset*; Mr. *Dudman* was the rector of that parish. After the passing of the *General Inclosure Act*, 41 Geo. 3, c. 109, a private Act called the *Pitney Inclosure Act*, XLII. Geo. 3, c. XV. was passed. An award was made under the latter of these Acts, which award, reciting both Acts, declared the existence of a modus in the parish, which "extended only to the lands when occupied by the owners thereof, or by persons residing within the parish," but went on to say that such lands were liable, where otherwise occupied, or when "converted into tillage," to the payment of tithes, the amounts of which were specified in a schedule. The modus on a field, now the property of Mr. *Vigar*, numbered 422 in the schedule to the award, and described as consisting of 1A. 1R. 3P. was stated to be 1*d.*; if "converted into tillage" the payment was to be 12*s.* 8½*d.* About forty years ago the owner built, for his own residence, a house upon this field, fenced off a part, which he converted into garden ground, and

planted the rest as an orchard. In 1869 the agents for the rector called on the owner for the payment of £3 16*s.* 3*d.* being six years' arrears of the charge of 12*s.* 8½*d.*, insisting that the modus had been broken and the land "converted into tillage." An action was brought in the County Court at *Langport* to enforce this claim; the case was removed by *certiorari* into the Court of Common Pleas, and the circumstances stated in a special case, liberty being reserved to the Court to draw all necessary inferences of fact. The Court of Common Pleas gave judgment for the Plaintiff (1), which judgment was afterwards affirmed in the Exchequer Chamber (2). This proceeding in Error was then brought.

Mr. *Philbrick*, and Mr. *Edwyn Jones*, for the Plaintiff in Error:—

Tillage is the state and condition of the land as opposed to what it is when merely meadow or pasture: *Birch* v. *Stephenson* (3). The conversion of this land into garden-ground and fruit orchard was therefore the conversion of it into tillage, the modus was broken, and the larger amount of tithe became payable. A modus dependent on occupation of a certain sort may be destroyed by any change in that mode of occupation: *Comyns'* Digest (4). That was the principle adopted in *Bedingfield* v. *Feak* (5). There the parson was to have the great tithes, and the vicar the small tithes. A field that had previously been planted with corn was planted with saffron, and the vicar thereon claimed the small tithes, and the Court said "that being converted to another nature and use, the tithe shall be paid to the vicar, as if it had been converted into

(1) Law Rep. 6 C. P. 470.

(2) Law Rep. 7 C. P. 72. It appeared that there had been made by Mr. *Vigar* a tender of increased tithe in respect of the ground actually converted into garden ground, but he insisted (fourth point for Defendant in Error in the Exchequer Chamber) that that "conversion did not render him liable to the increased rent upon the whole allotment as if the whole allotment had been converted into tillage." This matter did not seem to have been referred to in the Exchequer Chamber, and in the Common Pleas the Court had treated the garden and orchard as "mere accessories to the house," declaring that "the building of a house with such accessories was not a conversion of the land into tillage."

(3) 3 Taunt. 469.

(4) Dismes E. 20.

(5) Cro. Eliz. 467 (F. T. 38 Eliz.)

1873
DUDMAN
v.
VIGAR.

an orchard. So, if the vicar is to have all the hay, if the meadow be converted into arable, the parson shall have it: so *e converso*." That was recognised in *Rolle* (1). Here the modus is of a limited nature, and any change therefore destroys it. The change in the use is a conversion. To till is to break up the land, whether that is done with a spade or a plough. If the tithe had not been commuted, there can be no doubt that the change in the nature of the use of the land would have rendered it liable to the larger tithe. The word "tillage" used by the Commissioner cannot have a restricted meaning given to it so as to affect that general liability.

Mr. *Manisty*, Q.C., and Mr. *Arthur Charles*, for the Defendant in Error were not called upon.

THE LORD CHANCELLOR (Lord *Selborne*) :—

My Lords, the first observation which I will make in addressing your Lordships is, that so far as relates to the garden land, as distinct from the orchard land, the parties appear to me to have so presented their case as not to call for any expression of opinion from your Lordships upon that subject, because the matter stands thus: whether for the sake of peace, and to avoid question, or as conceding the point of principle, the Defendant in Error, before any distraint was made, actually tendered what is admitted to have been the full amount which would have been payable by him supposing that the garden ground should be held to have been converted into tillage, and supposing that the conversion of the garden ground into tillage would not extend to the whole of the rest of the land, which was not used as garden ground. And in his pleadings, I think, in both the Courts below, at all events in the "points of the Defendant in Error to the Exchequer Chamber," he appears to me to have adhered to the position which he had taken up by that tender, and not to have proposed to argue any question with respect to the garden ground excepting this, "that the conversion of twenty-two perches of land out of the allotment into garden ground does not render" him "liable to the increased rent upon the whole allotment, as if the whole allotment had been converted into tillage."

(1) Abr. 651, E. 2.

My Lords, it might have been open to argument, though no such argument was presented to your Lordships, that by the terms of the award the conversion of any part into tillage would make the whole liable. The Commissioner says, "I have inserted in the schedule, opposite to such lands, the tithe-money payment to be hereafter payable thereout respectively, in the event of and during the time when the same lands or any part thereof may be occupied by any person or persons not residing within the said parish of *Pitney Lortie*, or shall be converted into tillage." The counsel, I think, have exercised a very proper discretion in not arguing it, for I have a very clear opinion that the meaning of these words is not that the conversion into tillage of any part of these lands shall make the whole liable, but it shall make liable the part so converted. But it was apprehended that these words might be the subject of argument, and accordingly, not desiring to take the judgment of the Court upon that point, the Defendant in Error fortified himself by a tender before distraint. The Defendant in Error limited his argument to this, that assuming the garden land to be converted into tillage, the conversion of that part of the land did not make the orchard land liable. The only question for the opinion of the Court is, "whether under the above-mentioned circumstances the Plaintiff is entitled to recover against the Defendant damages in respect of the said distraint," which he would be entitled to if the distraint was unlawful. The distraint would be unlawful even if the garden land alone were held to be converted into tillage, because he had made a sufficient tender in that respect. I have said so much that it may be fully understood that, in my view of the case, no opinion whatever is intended to be pronounced by this House, one way or the other, as to the garden ground.

Then the question being limited to the orchard, I confess it appears to me not to be reasonably arguable that the planting of orchard trees, in a field previously occupied for pasture and laid down as grass land, and the continuance of the field in that state, with fruit-producing trees so planted in it, is a conversion of that part of the land into tillage; and, in truth, it has been only faintly, if at all, argued that it is so. The main stress of the argument was really laid upon an attempt, which I think quite untenable, to read this award, not as saying that the modus is to be paid in

1873
DUDMAN
v.
VIGAR.

all circumstances unless the land be occupied by a non-resident or converted into tillage, but to read it as saying that the modus is to be paid only so long as the land is in that state of cultivation in which, if the Act had not been passed, hay and agistment tithe, and no other tithe, would have been payable, and whenever the state of cultivation is altered, so that if the Act had not been passed, some other than the hay and agistment tithe, whether great tithe or small tithe, would have been payable, then it is to be treated for the purpose of future payments as if it were occupied by a non-resident or converted into tillage. My Lords, I am clearly of opinion that that is not a tenable construction of the Act. The Act settles, or at least, was meant to settle by the award, the future payments, once for all, between these parties; and, except for the purpose of illustration in argument, we have really nothing whatever to do with the law as it would have stood if the tithe had not been commuted. It was meant to commute the whole tithe, once for all.

Then what does the award say? The award recites the Act, which was very properly conceived in such terms as would apply either to a general modus in lieu of all tithe, or to a particular and limited modus in lieu of some particular description of tithe. After reciting the Act, the award proceeds to say that the schedule is appended for the purpose of ascertaining in future "what estates, lands, and grounds were so claimed to be exempt from the payment of such tithes." Now no particular description of tithes had been previously mentioned. The words "such tithes," therefore, are unlimited by the antecedent context as to the generality of their meaning. But it does not stop there. The award says the object of the schedule is to shew what the lands are, and to shew "the amount of the moduses or customary payments payable thereout respectively in lieu of such tithes." If we had had nothing more, and if we had had a schedule headed as this is, there might have been more room, perhaps, than there is at present for the argument which has been advanced, but it goes on to say distinctly, "as such claims respectively extended only to the said lands when occupied by the owners thereof, or by persons residing within the said parish of *Pitney Lortie* aforesaid"—a very special and peculiar kind of modus, one as to which it is just possible that

before the passing of this Act some doubt might have existed as to its lawfulness, but of course none can be raised now—the claims extended only to the "lands when occupied by the owners thereof, or by persons residing within the said parish of *Pitney Lortie* aforesaid, and such lands were subject to the payment of tithes in kind to the rector of *Pitney Lortie* when occupied by any person or persons not residing within the said parish of *Pitney Lortie*, or shall be converted into tillage."

The award speaks of a modus in terms which do not shew any limitation; but then it goes on to shew that there is a limitation, and to say what the limitation is. It is a limitation as to the residence of the person, and also a limitation to this effect—that when the lands shall be converted into tillage, then the modus is to apply. And accordingly the maker of the award inserts it in the schedule with the remark I have already quoted. And in the heading of the schedule there are words which seem to express their "shewing the yearly modus payable for hay and agistment tithe payments." But it does not say in that part of it anything about residence or non-residence. It is clearly not full; it is a short form of description. And then it goes on, "also the sums to be paid yearly for the same lands when occupied by non-residents or converted into tillage." The argument is that the words "converted into tillage" do not mean what they state, but that they mean something wholly different—that they mean converted into any other kind of use in respect of which other tithes would be payable. Then we have the columns of the schedule, which, after all, are the operative parts of the schedule. They mention the particular lands, and two distinct columns are headed "Yearly rents to be paid to the rector of *Pitney Lortie* when the modus lands shall be occupied by non-residents," and "Yearly rent to be paid to the rector of *Pitney Lortie* when the modus lands shall be converted into tillage." Now the object of this was to ascertain what was to be paid, and it is ascertained as plainly as words can express it, what payment is to be made in either of these two cases "when the modus lands shall be occupied by a non-resident," and "when the modus lands shall be converted into tillage."

Under these circumstances, my Lords, I think that the judg-

1873

DUDMAN v. VIGAR.

ment of the Court below was plainly right, and that this appeal ought to be dismissed.

LORD CHELMSFORD concurred.

LORD COLONSAY:—

My Lords, I also entirely agree. I think that what we have to do is just to construe this award; and there are no statements before us to shew that what is used as an orchard is used in any but the ordinary way in which orchards are used. Orchards are sometimes used by stirring all the soil below the trees for tillage; but we have no such special matter before us in this case. We must, therefore, take it in its ordinary sense. I think that the maker of the award must have been at some pains to find an appropriate expression when he used the word "tillage," if it is to have the meaning contended for by the Appellant.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 16th June, 1873.

Attorneys for Plaintiff in Error: *Lowless, Nelson, & Jones.*
Attorneys for Defendant in Error: *Vizard, Crowder, & Anstie.*

THE REVEREND JOHN ALLEN, Clerk . . { Plaintiff in Error; } 1873 June 16.

AND

THE BISHOP OF GLOUCESTER AND OTHERS { Defendants in Error. }

Church Building Act—Subscribers—Trustees.

By the *Church Building Act*, 5 Geo. 4, c. 103, persons subscribing (under that Act more than £50 towards building a church) might elect three life trustees who for forty years might nominate a clerk to serve the same. When any of the trustees died the majority of the subscribers at a meeting to be called for that purpose might (s. 7) elect a life trustee in his place; and (s. 8) if the subscribers should not exceed three they were to be the life trustees. If all the trustees should die (s. 12) so that no election could take place, the incumbent of the parish was to present. A church was built by subscriptions, raised in accordance with the Act, trustees were appointed, and all died but one. There was also a surviving subscriber, who had not been a trustee. He did not then know that there was a surviving trustee, and called in due form a meeting of subscribers. The surviving trustee did not attend it; the subscriber did, and elected himself. He pursued the same course after becoming aware of the death of the last trustee. After each election of himself as trustee he nominated a clerk:—

Held, that he had not, under the statute, any title to make such nomination, which therefore conferred no title to admission.

THIS was a proceeding in Error on a *quare impedit* brought to determine whether Mr. *Fowler* possessed the power to nominate a clerk to serve the church or chapel of the *Holy Trinity Hotwells*, in the city of *Bristol*, and the diocese of *Gloucester* and *Bristol*. The facts of this case are fully detailed in the report in the Court below (1). The 5 Geo. 4, c. 103, was passed to encourage the building of additional churches in populous parishes, and among its other provisions enacted (s. 6) that "persons proposing to build a church, &c., and subscribing for that purpose sums of not less than £50 each shall elect three trustees from amongst themselves" for the management of the temporal affairs of such church, "and for the nomination to the bishop for a limited period of a spiritual person to serve the same." They were to be called "life trustees." By sect. 7 on the death or resignation of a life trustee it was to be lawful for the majority of the persons who have subscribed not

(1) Law Rep. 4 C. P. 668, *nom. Fowler* v. *The Bishop of Gloucester*.

1873
ALLEN
v.
BISHOP OF GLOUCESTER.

less than £50 each, and being owners or renters of pews in the same church, who shall be present at any meeting to be called for that purpose, and which meeting any one or more of such trustees are hereby authorized and required to call, &c., to nominate and appoint by writing under their hands any other person having subscribed a sum not less than £50, and being an owner or renter of a pew in such church, &c.," a life trustee, and he was to be vested with the like powers as the rest. By the 8th section it was provided that " if the number of persons subscribing to build, &c., shall not exceed three, such person or persons shall be and be deemed to be the life trustee or trustees of such church, &c., under the provisions of this Act, and shall have the like powers and authorities as any such life trustees as aforesaid chosen under this Act; and in case of the death of any such life trustee the person nominated by him, being a member of the Church of *England*, by his will shall be a life trustee in his place." By sect. 12 the life trustee or trustees might nominate for any term within forty years after the consecration of the church; the subsequent nominations were to be in the incumbent of the parish, and if all the subscribers entitled to elect trustees should die before such nominations were made, or before the forty years had elapsed, the nomination was to be made by the incumbent, who was to become a trustee, provided all the subscribers should die, so that no nomination could be made.

In the year 1830 the church in question was built by the subscriptions of a considerable number of persons, each of whom subscribed £60 for that purpose. Trustees were appointed, and nominations duly made. In July, 1854, *Harford*, *Hensman*, and *Hilhouse* were the three trustees. In April, 1864 *Hensman* died, and no new trustee was appointed in his place. There were then only three of the subscribers living, *Harford* and *Hilhouse* (the two surviving trustees) and *Fowler*. In April, 1866, *Harford* died. In July, 1866, *Fowler* (not being aware that *Hilhouse* was still alive) affixed to the door of the church the proper notice for a meeting of the subscribers to appoint a life trustee. At the time appointed *Fowler* alone attended, and in due form appointed himself to be a life trustee. In April, 1867, *Hilhouse* died, and *Fowler* was then the only surviving subscriber. On the 11th of August, 1867, the church became vacant, and on the 22nd of August

Fowler nominated and presented to the bishop the Rev. *John Allen* for admission to the church. The bishop did not act on the nomination. After the nomination *Fowler* became aware of the fact that *Hilhouse* up to the time of his death had claimed to be and to act as a trustee; and on the 5th of September, 1867, *Fowler* affixed on the door of the church another notice for a meeting of the subscribers to take place on the 20th of September to elect trustees. On the 20th of September *Fowler* attended and elected himself, and again nominated Mr. *Allen* as his clerk. In the meantime, namely, on the 19th of August, 1867, the Rev. Mr. *Anderson,* the incumbent of the parish, nominated the Rev. Mr. *Wallace* as his clerk, and the bishop acted on this nomination.

By the statute the being owner or renter of a pew was mentioned as part of the qualification to be a life trustee. It appeared that on the original allotment of pews one had been allotted to *Fowler,* who paid the rent for it for some years, but had ceased to do so before 1855. In August, 1866, he applied for another pew, and paid six months' rent for it in advance, and in September, 1867, became assignee of another pew. He was and is a member of the Church of *England.*

On this special case the Court was to be at liberty to draw inferences, and the question raised was, whether on either occasion, the 22nd of August or the 20th of September, *Fowler* was lawfully entitled as a life trustee to nominate and present a clerk for admission. The Court of Common Pleas (*diss.* Mr. Justice *Brett*) had held that under the 5 Geo. 4, c. 103, the 7th section directed the mode of appointing new trustees to be by a majority of the surviving trustees; that the 8th section did not provide a different course; and that on the death of some or all of the trustees without such election having taken place the sole surviving subscriber did not by force of the statute become a trustee, and that therefore Mr. *Fowler* was not so entitled. That decision was sustained in the Exchequer Chamber. The case was then brought up to this House on Error.

Mr. *Philbrick,* and Mr. *D. Yelverton,* for the Plaintiff in Error :—

Mr. *Fowler* was, under the circumstances and by the force of the general intention of the statute, which meant to secure the rights

1873
ALLEN
v.
BISHOP OF
GLOUCESTER.

of all the subscribers, the sole surviving subscriber, and became the sole trustee, and as such was entitled to make the nomination. The circumstances had not arisen which were to vest the right of nomination in the incumbent of the parish.

Mr. *Lopes*, Q.C., and Mr. *Ledgard*, for the Defendants in Error, were not called on.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, in this case we have to construe a very obscure and imperfectly expressed Act of Parliament, which very probably may not have provided for all the events which ought to have been provided for; but I take it to be quite clear that the particular case which has happened is one that is provided for, namely, that at a certain period, all the trustees being dead, the incumbent for the time being became a trustee. A vacancy having happened in the office of trustee, Mr. *Fowler*, who believed that he was the only surviving original subscriber of more than £50, nominated himself a trustee under the Act of Parliament, and the presentation, which was afterwards made, was made upon the supposition that the incumbent was not a trustee. It is admitted, and it must be admitted, that the present appeal could not succeed unless Mr. *Fowler* was the sole trustee when he made the presentation. In my opinion he was not. I think your Lordships will be of opinion that the Judges in the Court below, who were practically unanimous I may say, because the only dissenting Judge dissented upon a ground which is not insisted upon before us, have come to a sound conclusion; and I therefore have to move your Lordships that the judgment of the Court of Exchequer Chamber be affirmed and the appeal dismissed.

LORD CHELMSFORD and LORD COLONSAY concurred.

Judgment of the Court of Exchequer Chamber affirmed.

Lords' Journals, 16th June, 1873.

John Allen, clerk, Plaintiff in Error in person.

Attorneys for Defendant in Error: *Young, Maples, Teesdale, Nelson, & Co.*

THE RIGHT HON. FREDERICK EARL BEAUCHAMP . . . . . } APPELLANT;

AND

CHARLES WINN . . . . . RESPONDENT.

1873

Mar. 13, 14, 17, 18, 20, 21; *May* 15.

Franchise "Warren"—"Warren of Conies"—"Lodge thereupon built."

Where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief.

The Court of Equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition.

What is the nature of a mistake and what has been the cause of it will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief.

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed.

A grant of "warren" may pass the soil: it may pass nothing but a franchise to be exercised over the soil. The phrase "a warren of conies" will only pass the franchise.

A right of entering within the limits of a warren to kill rabbits may be properly described as a "tenement."

The Duchy of *Cornwall* was in the possession both of the soil of a manor, and of a warren of conies existing over certain parts of the manor. In March, 1799, the Duchy granted a lease to *P.*, in which the subjects granted were thus described: "All that piece or parcel of woodland situate in *B.*, &c., and all that close called, &c., and all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in *B.*, &c., aforesaid; and that lodge or house thereupon built, &c.; and also all that warren of conies, with all and singular the rights, members, and appurtenances whatsover in *R.*, &c., both of which said warrens of conies are called or known by the name of *B.* warren, and do extend themselves in and over the wastes or moors of *B.*, *F.*, *S.*, and *A.*," &c.:—

Held, that these words did not carry the soil, but only a right to the conies, and whatever was fairly incident to, or necessary for, the preserving and making profit of them.

THIS was an appeal against an order of the Lords Justices which had affirmed a previous decree of the Master of the Rolls.

1873
EARL BEAUCHAMP v. WINN.

The suit had been originally instituted by *Henry*, the fifth Earl *Beauchamp*, with a prayer to set aside a contract of exchange of property made between him and Mr. *Winn*, on the ground that it had been made in mutual mistake as to each other's rights. The whole question depended on the construction to be put on a certain grant, of March 1799, from the Duchy of *Cornwall* to the ancestor of the present Earl. Another grant had been made to Mr. *Angerstein*, the predecessor of Mr. *Winn*, in the month of July, 1799; but though the terms of this latter grant were introduced in argument, the real question arose on the terms of the grant of March, 1799.

In 1777 the Council of the Duke of *Cornwall* leased to the Revd. *Robert Pindar* for a reversionary terms of nineteen years from the 13th of July, 1788, certain property belonging to the Duchy, and *Thomas Pindar*, Esq., in 1799, in a petition to the Council of the Duchy, recited this lease, and declared that he was desirous to purchase the inheritance of the premises. The sale was made under the authority of the 38 Geo. 3, c. 60, s. 57 (1). The description given in the lease was of "a parcel of woodland in *Bromby*, and a certain warren of conies in *Bromby*, *Redbourne*, *Frodingham*, *Scunthorpe*, and *Ashby*, with the fishery of the water of *Trent*, parcel of the lordship or soke of *Kirton-in-Lindsey*." A certificate of contract of sale was made by warrant of the council, and a grant executed dated the 27th of March, 1799, in which the description of the property was, "all that piece or parcel of woodland situate in *Bromby*, in the county of *Lincoln*, commonly called *Prince's Woods*, &c., and all that close called *Woodend Close*, &c., and all that *warren of conies*, with all and singular the rights, members, and appurtenances whatsoever in *Bromby* aforesaid; and that *lodge or house thereupon built* commonly called *Bromby Lodge;*

(1) By which it was enacted that it might be lawful for the "Surveyor General of the Duchy of *Cornwall* to contract with any person or persons for the sale from time to time of such or so much of the manors, messuages, lands, tenements, rates, tithes, mines, minerals, collieries, woods, woodgrounds, fens, marshes, or waste lands belonging to and parcel of the said Duchy of *Cornwall*, for the best prices or consideration in money which the said Surveyor-General shall be able to procure for the same, as will raise a sum of money sufficient for the redemption of the Land Tax charged upon the manors, messuages, lands, or any revenue belonging to and parcel of the said Duchy of *Cornwall*."

and also all that *warren of conies*, with all and singular the rights, members, and appurtenances whatsoever in *Redbourne*, in the said county of *Lincoln;* both which said warrens of conies are called or known by the name of *Bromby Warren*, and do extend themselves in and over the wastes or *Eastmoors* of *Bromby*, *Frodingham*, *Scunthorpe*, and *Ashby* in the said county of *Lincoln*, which said several premises are parcel of the lordship and soke of *Kirton-in-Lindsey*, in the said county of *Lincoln*, and parcel of the possessions of the Duchy of *Cornwall*, and were last demised, together with the fishery of the River *Trent*," by *George* III. on the 15th of August, 1777, unto *Robert Pindar* of *Bromby Hall*, &c., clerk, for a reversionary term of nineteen years, to commence from the 13th day of July, 1788, under the several yearly rents of 20*s.* for the said woodlands, and £3 7*s.* 4½*d.* for the said coney warren.

There were two Inclosure Acts, one for *Ashby* in 1801, and another for *Frodingham* in 1831, and under these the predecessors of the Earl had claimed for a right of warren over the lands to be enclosed, and had received an allotment in respect thereof, and the predecessor of Mr. *Winn* had claimed in respect of the soil, and had received an allotment in respect of that claim.

In 1864 the then Earl (the fifth Earl, who had not long before succeeded to the estates) and Mr. *Winn* agreed upon an exchange of properties, and both alike proceeded on the belief that the Earl had only the right of warren over the lands, and that Mr. *Winn* had the right to the lands themselves. The agreement was framed on these suppositions, and in virtue of them the Earl was to pay a sum of £3400 in order to establish an equality in the exchanges. Up to a very few years ago the *East Common* was only used as a rabbit warren; but a few years ago the discovery was made that a vein of valuable mineral lay under its surface, and its value, which had before been estimated at a few hundreds of pounds, was at once believed to amount to a great many thousands.

In 1865 certain Commissioners were appointed for the purpose of inclosing these commons, and in order to substantiate a claim to certain rights of common over the commons thus to be inclosed, search was made at the family seat of Earl *Beauchamp* for family deeds relating to the property derived from Mr. *Pindar*.

1873
EARL BEAUCHAMP v. WINN.

The lease of March, 1799, granted by the Duchy, on which this claim was now founded, was then carefully examined, and the opinion was adopted that it passed not merely the right of preserving and killing conies on the land, but the right to the land itself. A communication to this effect was made by Mr. *Walford*, the Earl's solicitor, to Mr. *Baxter*, the solicitor for Mr. *Winn*, and a proposal was made to set right the alleged mistake. The mistake was denied, and the proposal declined. A petition was presented to the House of Commons for leave to bring in a bill to rectify the proceedings relative to the inclosure of *Bromby Common*. This was refused.

The bill in this case was then filed by the late Earl (the predecessor of the present Appellant) to rescind the agreement entered into in October, 1864, for the exchange of properties. The ground on which the application was made was, that the agreement was entered into in mutual ignorance as to the rights possessed by each party in his own property, and that in fact *Bromby* was a manor of itself, and that the Earl was the lord of that manor. The Respondent altogether denied the mistake, and denied that *Bromby* was a manor, the only manor being that of the manor and soke of *Kirton-in-Lindsey*, of which *Bromby* was parcel.

A great deal of evidence as to the extent of the manor and the rights enjoyed by different parties was given, but is quite unnecessary to be referred to, as the decision proceeded entirely on the construction of the grant of March, 1799.

The cause was heard before the Master of the Rolls on the 16th of December, 1868, when his Lordship dismissed the Plaintiff's bill with costs. The Earl appealed, and the Lord Justice *Giffard*, delivering the judgment of Lord Justice *Selwyn* and himself, affirmed the decision of the Court below (1).

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *J. W. Chitty*, for the Appellant:—

The first difficulty here is in the mere form of expression. The grant is not a grant of "free warren," but of "warren of conies." But that form of phrase is really immaterial. "Warren of conies" is a proper term for the land. A rabbit warren is the land. A

(1) Law Rep. 4 Ch. Ap. 562.

coney warren is the land. The mere transposition of the words to "warren of conies" can make no difference in the meaning, and the added words in the grant, "and the house thereupon built," render it impossible to mistake that meaning. They must signify a house built upon the land. A house cannot be built upon a franchise. It is built upon land—a reality; not on a franchise—an ideal thing. Not only will the word "warren" pass the land, but it is the proper word to pass it. Where mines and quarries are intended to be excepted from such a grant the exception is expressed; but where the exception is not expressly made it will not be implied. It is not made here, and cannot be implied. The general words used are sufficient to pass the property in the land itself.

Then, again, the warren is to be stocked and stored with a sufficient number of conies. A franchise cannot be stocked—it must be the land that is stocked.

Here, too, Mr. *Pindar* was the owner of a lease; he petitioned to buy the reversion—that is, the land, the estate itself—and the estate was sold to him. The 38 Geo. 3 does not speak of selling franchises, but of lands and tenements; and the grant to Mr. *Pindar* must be construed with reference to that Act.

There is no such thing as a grant of warren without the soil; a franchise of warren is an indivisible thing—it exists in the land, and is inseparable from it; and here the warren itself is granted, and the extent of it is described. That very description itself shews that the land was meant to pass.

There would not be a grant of water; that of course would mean nothing but a grant of the land covered with water. But a grant of free fishery would cover both. The land would pass. The allegation of a several fishery *primâ facie* imports the ownership of the soil, and that has been so held in virtue of authorities which the Court considered to be decisively binding: *Marshall* v. *Ullswater* (1). If a grant of free fishery did not pass the soil, the grantee could not repair a sea wall, the existence of which might be indispensable to the existence of the fishery. The fishery could not be a mere franchise, nor could the warren be so.

The description here was sufficient to convey the land: *Co.*

(1) 3 B. & S. 732.

1873
EARL BEAUCHAMP v. WINN.

Litt. 5, b; *Sheppard's* Touchstone (1); *Rice* v. *Wiseman* (2); Fourth Institute (3); *Blackstone* (4); *Marshall* v. *Ullswater* (5); *The Prince's Case* (6); *Comyn* (7); and the description was rendered unquestionable by the words "and the house thereupon built:" *Bythewood* (8). The following authorities were also cited: *The Case of the Forests* (9); *Jacob's* Law Dictionary (10); *Burn's* Justice (11); *Boulstone* v. *Hardy* (12); *West's* Symboliography (13); *Cruise's* Digest (14); *Whilster* v. *Paslow* (15); *Pincomb* v. *Thomas* (16); *Townley* v. *Gibson* (17).

As to the relief which a Court of Equity would grant in such a case there were cited, among other authorities, *Bingham* v. *Bingham* (18); *Cooper* v. *Phibbs* (19); *Farewell* v. *Coker* (20); *Ramsden* v. *Hylton* (21); *Harris* v. *Pepperill* (22); and *Cochrane* v. *Willis* (23). And not merely will a mistake be relieved against, but a positive renunciation of a legal right will not be supported if the party making it was at the time ignorant of what were those rights, and what was the value of the property renounced: *McCarthy* v. *Decaix* (24); *Broughton* v. *Hutt* (25).

Sir *J. Karslake*, Q.C., and Mr. *Fry*, Q.C. (Mr. *Speed* and Mr. *Jeune* were with them), for the Respondent:—

To take the last point first. Equity will not interfere to set aside an arrangement made with perfect honesty on both sides, (even though it should appear that there had been mutual mistakes) where the agreement had been *bonâ fide* acted on for years, and where it would be impossible to replace the parties in their original position: *Story's* Equity (26); *Wason* v. *Wareing* (27);

(1) Pages 96–98.
(2) 3 Bulst. 82; 1 Roll. 259.
(3) 298 *et seq.*
(4) Vol. ii. p. 39.
(5) 3 B. & S. 732.
(6) 8 Co. Rep. 1.
(7) Dig. tit. "Chase. D.—F."
(8) Prec. in Conv. Ed. by Sweet, vol. iv. p. 519.
(9) 12 Co. Rep. 22.
(10) *Voce* "Chase."
(11) Ed. 1776, p. 460, par. 10.
(12) Cro. Eliz. 547.
(13) Sect. 359.
(14) Vol. iii. p. 248, tit. 27, pl. 20.
(15) Cro. Jac. 487.
(16) Ibid. 524.
(17) 2 T. R. 701.
(18) 1 Ves. Sen. 126.
(19) Law Rep. 2 H. L. 149.
(20) 2 Mer. 353.
(21) 2 Ves. Sen. 304.
(22) Law Rep. 5 Eq. 1.
(23) Law Rep. 1 Ch. Ap. 58.
(24) 2 Russ. & My. 614–621.
(25) 3 De G. & J. 501.
(26) §§ 113, 146.
(27) 15 Beav. 151.

1873.
EARL BEAUCHAMP v. WINN.

Campbell v. *Ingilby* (1); *Directors of Midland Great Western Railway of Ireland* v. *Johnson* (2); *Marshall* v. *Collett* (3); *Rashdall* v. *Ford* (4); *Underwood* v. *Courtown* (5); *Ramsden* v. *Hilton* (6); *Smith* v. *Clay* (7); *Evans* v. *Llewelly* (8).

But here there was no mistake. There never had been any grant to Mr. *Pindar* beyond that of a right to preserve, chase, and kill rabbits. The title to the soil never passed to him. A grant in these terms will not pass the soil—the words themselves are restricted to a franchise to be exercised upon it. The cases already cited were commented on, and the following, among other additional authorities, were cited: *Viner* (9); *Davies's Case* (10); *Rex* v. *Inhabitants of Piddletrenthide* (11); *Duke of Buccleuch* v. *Wakefield* (12); *Holford* v. *Bailey* (13); *Rigge* v. *The Earl of Lonsdale* (14).

There must be a description of the land, and of the boundaries of the land, where the right is to be exercised; but the fact that there is such a description affords no proof whatever that the land itself was intended to pass. Nor do the words, "and the lodge thereupon built," for they, too, are merely part of the same description, and must be referred to the whole context; and such a reference will shew that not the property in the lodge, any more than the property in the land, but the use of it as an incident to the use of the land, was all that was intended to be granted. The words are a mere part of the general description.

The only manor is that of *Kirton*, and *Bromby* is merely parcel of it.

The *Solicitor General* replied.

LORD CHELMSFORD:— *May* 15.

My Lords, this is an appeal from a decree of the Lords Justices, affirming a decree of the Master of the Rolls, in a suit instituted

(1) 1 De G. & J. 393. 2 Jur N.S. 411
(2) 6 H. L. C. 798. 4 Jur N.S. 843
(3) 1 Y. & C. Ex. 232.
(4) Law Rep. 2 Eq. 750.
(5) 2 Sch. & Lef. 41.
(6) 2 Ves. Sen. 304.
(7) 3 Bro. C. C. 640, n.
(8) 2 Bro. C. C. 150.
(9) Abr. tit. "Franchise"—"Warren, F."
(10) 3 Mod. 246.
(11) 3 T. R. 772.
(12) Law Rep. 4 H. L. 377.
(13) 8 Q. B. 1000.
(14) 11 Ex. 654; 1 H. & N. 923; See *Blades* v. *Higgs*, 11 H. L. C. 621. 11 Jur N.S. 701.

1873
EARL BEAUCHAMP v. WINN.

for the purpose of varying or setting aside an agreement for exchange of certain lands and hereditaments belonging or assumed to belong to the parties respectively. The ground for this application to the power of a Court of Equity is, that a common mistake has been made by these parties as to their respective rights and interests in the properties, or some of them, so agreed to be exchanged:—[His Lordship here stated very fully the facts of the case.]

The Master of the Rolls having dismissed the bill, and his decree having been affirmed by the Lords Justices, this appeal has been brought, and the questions raised by it are, first, whether, in point of fact, there was any common mistake between the parties as to their rights and interests in the subjects respectively exchanged. And, second, whether, if such common mistake existed, the Appellant is not precluded from asking to have the agreement set aside, either on the ground that the late Earl knew, or had the means of knowing, all the circumstances connected with the title to the exchanged properties; or on account of there having been such dealings with the properties since the agreement as prevent the parties being reinstated in their original position.

It will be best to begin with the latter question; and, assuming that both parties dealt with each other under a common mistake, to consider whether upon the facts and circumstances of the case, the Appellant is entitled to invoke the interposition of Equity to set aside the agreement.

Before and at the time the agreement was entered into, the late Earl had in his possession the title deeds of the property, which came to him under the will of *Thomas Pindar*. This appears from the affidavit of Mr. *Walford*, who states that in December, 1865, the late Earl sent him a box containing old title deeds and papers. From these documents, counsel advised that the *East Commons*, and the mines and minerals thereunder, and under the *East Commons* of *Frodingham* and *Scunthorpe*, were, by the grant from the Duchy of *Cornwall* of the 27th of March, 1799, conveyed to *Thomas Pindar*. Mr. *Walford* states that at the time of entering into the agreement the Earl and himself were ignorant of the title to the property derived from *Thomas Pindar*, antecedent to his will, dated the 15th of October, 1811. This is not a case of

mistake, therefore, but of ignorance; and ignorance resulting from a party's own omission to avail himself of information within his power. The will of *Thomas Pindar* devised the *East Common*, not by a specific description, but under the general words "all and every my freehold, copyhold, and leasehold estates." And as an exchange generally proceeds upon an estimate of the value of the respective subjects of exchange (which must have been the case in this instance, because the sum of £3,400 was given for equality of exchange), it is evident that by some document, of later date than *Thomas Pindar's* will, it must have been ascertained what it was that the late Earl was proposing to give to Mr. *Winn* in respect of the *East Common* of *Bromby*. From Mr. *Walford's* affidavit it appears that the late Earl knew that he and his father from time to time had let the right of breeding and killing rabbits upon the *East Common*, and had received rent for the same. And on the application to the Inclosure Commissioners, which was sent in a year before Mr. *Walford's* discovery of the grant from the Duchy to *Pindar*, it is stated that the "Earl had the exclusive right of rabbit warren over the whole of the *East Common*." Therefore, the late Earl must have known, however the knowledge was acquired, that he had a rabbit warren in the *East Common;* but he was probably ignorant that any question could exist as to the extent of the right and interest it conveyed.

Had the title to the property prior to *Thomas Pindar's* will been examined, it would have been apparent that the Earl's predecessors had never claimed any other right than that of a rabbit warren over the *East Common*. It would have disclosed the fact that in 1801, only two years after the grant from the Duchy to *Thomas Pindar*, when the rights acquired under it were likely to be fully understood, upon an inclosure of lands within the township of *Ashby*, *Pindar* claimed a right of warren over the *East Common* and after his right had been established in a feigned issue, had an allotment made to him in respect of this claim.

Proceeding with the investigation of the title from the date of *Thomas Pindar's* will, it would have appeared that in 1831 the *Frodingham* inclosure took place; and that the predecessor of the Appellant preferred a claim for an allotment for a warren of conies or right of warren for conies, called *Bromby Warren*, extending

1873
EARL BEAUCHAMP v. WINN.

over the waste or *East Moors* of *Bromby*, *Frodingham*, *Scunthorpe*, and *Ashby*. It was observed in the argument for the Respondent that, at the time of preparing this claim the grant of 1799 must have been before the person who prepared it, for it follows the exact words of that grant. The mistake, therefore, upon which the Appellant founds his equity is one which has existed (if at all) for more than sixty years, which has governed the dealings with the property during the whole of that long period, and which was at last almost accidentally discovered, after that agreement had been entered into which, on account of the alleged mistake, is sought to be set aside.

The Respondent urges as a sort of preliminary objection to the claim of the Appellant to have the agreement cancelled or set aside, that the subsequent dealings of the parties with the property prevent their being restored to their former position. For this reliance is placed upon a transaction respecting a warping drain, and the inclosure of the *Bromley Commons*, as rendering it impracticable to reinstate the parties in the full integrity of their former rights. If there existed a clear ground of mistake which in itself would have entitled the Appellant to set the agreement aside, and there really had been that enormous disproportion between the value of the property which the late Earl thought he was giving in exchange, and that which really belonged to him, I should be unwilling to believe that Equity would refuse its aid on account of transactions respecting the exchanged properties, which it would not be difficult to adjust so as to place the parties in a position in which they would receive little or no prejudice from what had been done after the exchange.

Another objection to the interposition of Equity was founded upon the length of time during which the mistake as to the parties' rights and interests had existed. I asked whether there was any case in which error having been honestly entertained for many years, Equity had refused to interfere solely on the ground of length of time. In his answer to this question the learned Counsel for the Respondent introduced the element of "means of knowledge" during the time, which makes it a totally different proposition. But this objection to the Appellant's claim to relief, founded on the length of time during which the mistake which

would entitle him to it has subsisted, appears to me to be wholly inadmissible. The question is, whether the late Earl entered into the agreement for exchange under a mistake as to his rights and interests? Supposing it to be proved that the Earl laboured under this mistake, what answer can it be to his claim to be relieved from the consequences of it that his predecessors acted for sixty years under the influence of a similar mistake?

The cases in which Equity interferes to set aside contracts are those in which either there has been mutual mistake or ignorance in both parties affecting the essence of the contracts, or a fact is known to one party and unknown to the other, and there is some fraud or surprise upon the ignorant party. It was said by the Counsel for the Respondent, that in this case there was no mutual mistake, but only the mistake of the late Earl, Mr. *Winn* not having been mistaken as to the interest which the Earl really had in the *East Common*. But in considering this part of the case it has been assumed, for the purpose of the argument, that the late Earl was under a mistake as to his interest, and thought he was entitled only to a right of warren over the *East Common*, whereas he was the owner of the soil. Mr. *Winn*, upon this assumption, was also under a mistake, as he thought the Earl had only the warren, and that the soil belonged to himself. The case must be dealt with, therefore, as one of mutual mistake.

But dealing with the case upon this footing, it was argued that the agreement could not be set aside in Equity, as the late Earl at the time of entering into it knew, or had the means of knowing, what his rights in the *East Common* were, and that at all events his mistake was one of law. Cases were cited on the part of the Respondent to shew that where a party is put upon inquiry, and by reasonable diligence he might have obtained knowledge of a fact of which he remained in ignorance, Equity would not relieve him, since that would be to encourage culpable negligence. As already appears, there can be no doubt that if the late Earl, at the time of the treaty for the exchange, had taken the trouble to examine his title deeds, he would have found the grant of 1799 from the Duchy to *Thomas Pindar*.

Can it be fairly alleged that culpable negligence was imputable to the late Earl in not availing himself of this information in his

1873

EARL BEAUCHAMP v. WINN.

possession respecting his title to the *East Common*? The reason given for this grant having been overlooked is, that the estate came to the late Earl from *Thomas Pindar* in 1811, that it was considered unnecessary to investigate the title from an earlier period, and that the only exercise of rights upon the *East Common* had been by the father of the late Earl and himself letting the right of breeding and killing rabbits, and receiving rent for such right. And it may be remarked, that if reference had been made to the neglected document, the knowledge which it would have imparted would have been of a grant of doubtful construction. I cannot think that, taking all the circumstances into consideration, there was such wilful ignorance or culpable neglect as would have deprived the late Earl of his right to relief if he was entitled to it upon other grounds.

With regard to the objection, that the mistake (if any) was one of law, and that the rule, "*Ignorantia juris neminem excusat*" applies, I would observe upon the peculiarity of this case, that the ignorance imputable to the party was of a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well-known rule of law. And there are many cases to be found in which Equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake. Therefore, although when a certain construction has been put by a Court of Law upon a deed, it must be taken that the legal construction was clear, yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion, be pressed to the extent of depriving a person of relief on the ground that he was bound himself to have known beforehand how the grant must be construed.

It was farther argued for the Respondent that the Appellant was barred from relief by acquiescence, which might, it was said, be implied from length of time. But whose acquiescence is here intended? The only person to whom it can have any application is the late Earl, and his acquiescence was certainly of no long duration. The same assumption must be made, in considering this objection, as upon all that has been already said, that the late Earl was under a mistake, and ignorant of his rights. Now there can

be no doubt that acquiescence, to operate as an equitable estoppel, must be with knowledge that the party acquiescing has a right which would be available against that which he has permitted to be enjoyed.

I have gone, perhaps, at too much length into the consideration of the question as to the Appellant's right to set aside the agreement of exchange, but great stress was laid upon this part of the case in the argument on the part of the Respondent. After a careful consideration of these arguments, I have come to the conclusion that, supposing a foundation had been laid for the interposition of Equity by shewing that the Earl had mistaken his right to the *East Common*, and that he was in law the owner of the soil, instead of having merely a right over the surface, there would have been nothing in the objections which have been urged on the part of the Respondent to prevent his claim to have the agreement set aside being entertained.

I now proceed to the more important question in the case, whether the parties in dealing with each other were under a mistake as to their rights; or whether their respective interests in the exchanged properties were not such as they supposed them to be, and intended and agreed to convey to each other. This question must be considered under three heads:—1. Is the Appellant entitled under the grant from the Duchy to *Thomas Pindar*, in 1799, to the soil of the *East Common*, in *Bromby*, or merely to the right or stray of rabbits, or right of warren thereon? 2. Was the Respondent at the time of the agreement entitled to the mines and minerals in the freehold fields in the parish of *Frodingham* (no question being raised by the bill as to the fields in *Ashby*), or did they belong to Earl *Beauchamp?* 3. Was the Respondent entitled to any rights and interests in that portion of the *East Common* which he gave in exchange, by the description of his right, title, and interest as lord of the manor of *Bromby?*

The nature and extent of the Appellant's right in the *East Common* depend entirely upon the construction of the certificate of contract for sale, or grant from the Duchy of *Cornwall* to *Thomas Pindar*, on the 27th of March, 1799. The part of the grant upon which the question turns is in these terms:—[His Lordship here read it, see *ante*, p. 224.] The question is, did the term "warren of

1873

EARL BEAUCHAMP v. WINN.

conies" pass to the grantee the soil of the wastes over which the warren extends, or did it merely create a franchise; that is, the right of breeding and killing rabbits within the limits of the warren.

Upon the question of the construction of this grant we were strongly pressed by the counsel for the Appellant to approach the consideration of it with minds unprejudiced by notions gathered from anything which had previously occurred in respect to the subject in question, as it was said that the Master of the Rolls and the Lords Justices, by pursuing a contrary course, had been led to the erroneous conclusion at which it was contended they had arrived. But a Judge, before he proceeds to form a conclusive opinion upon the construction of a doubtful instrument, may be permitted to gather light from every source where it may be found, without its being attributed to him that he is thereby prejudicing, his mind and misleading his judgment. And where a term is ambiguous, and capable of having more than one meaning attributed to it, it cannot be improper to determine how it ought to be construed in the instrument under consideration, by ascertaining the sense in which it has been used in its application to the same subject upon previous occasions.

The term "warren" is one of those terms which has not always the same precise and definite meaning. It may be the expression of the grant of a franchise only, or it may import a conveyance of the soil. It was insisted, on the part of the Appellant, that by a grant of warren *ex vi termini* the soil passes; and that as a franchise cannot be divided the grant of a warren of conies would be bad if it granted merely a franchise, and that to be good it must include within it a grant of the soil. To prove the force of the term "warren" to be that which is contended for the Appellant cited *Coke* upon *Littleton* (1), where, after a long enumeration of the things which pass by certain words, and amongst them stating that by the name *stagnum* and *gurges* (2) the soil passes, Lord *Coke* adds: "so it is of a forest, park, chase, vivary, and warren on a man's own ground; by the grant of them not only the privilege, but the land itself passes, for they are

(1) 5 b.

(2) As to the meaning of these words see *Malcolmson* v. *O'Dea*, 10 H. L. C. 603.

compound." This passage is also word for word in *Sheppard's* Touchstone (1); but Mr. *Preston*, in his edition of this work, after the words "grant of them," introduces these words, "generally without qualification or context."

The case of *Rice* v. *Wiseman* (2), which was relied upon by the Appellant, appears not to have involved the question of a right to the soil. It was an action for breach of covenant brought against the owner of a warren in a park, who had demised to the Plaintiff, *warrenam suam, anglicè*, the game of conies, and the breach laid was in killing of the conies in the park *sibi dimisso*. Now it appears that nothing was demised to the Plaintiff but the warren, which was interpreted to mean "the game of conies." It would rather appear, from the words of the demise, that the soil did not pass. But whether it did or not was wholly immaterial to the determination of the case, as there would, in either construction, have been a breach of the covenant that the lessee should enjoy the benefit of his demise, if the lessor killed the conies. And the only question raised appears to have been whether the warren demised was intended to be in the whole park, which the Court agreed that it was. Little stress, therefore, can properly be laid upon the *obiter* opinions of the Judges in the conversation which took place between them. Lord *Coke*, in the course of it, says: "If I have warren in my land, and I demise my warren in such a place, clearly the soil doth pass;" and then immediately follows what is not very intelligible: "If the soil be in him by a grant or lease of the park, the soil doth pass." That these opinions were thrown out without much consideration appears from what is afterwards said by Lord *Coke*: "By 33 Hen. 6, If one grants his warren excepting the soil, the same does not pass, and *therefore*" (an extraordinary consequence) "it followeth that if it had not been excepted the same would have passed." And *Doddridge*, J., put a case which one would hardly think it necessary to have been stated, that "a man may have a warren in another man's land, and there, by the grant of the warren, the soil doth not pass," for of course the grantor could not have given what did not belong to him.

The authorities to support the argument, that the grant of a

(1) Page 90. (2) 3 Bulstr. 82; 1 Roll. 259.

1873
EARL BEAUCHAMP v. WINN.

warren includes within it the soil over which the warren extends, are not very convincing; while on the other hand there are strong grounds for concluding that in general the use of the term would rather import the grant of a liberty or franchise without the soil. There is no doubt that a warren may be claimed by prescription, but land cannot, the title by prescription being applicable only to incorporeal hereditaments. Thus, in the *Case of Forests* (1), it is said: "within a chase the owner of the soil may have warren for his conies by grant or by *prescription*" (which pre-supposes a grant); "but he cannot surcharge with more than hath been used time from which, &c., nor make burrows in other places than have been used from the time of which, &c., unless he hath warren by grant, and then he may use it according to his grant." By this I understand that a man may claim a warren within a chase by prescription, but he shall not, by surcharging or making burrows in unaccustomed places, interfere with the paramount rights of the owner of the chase. That a warren may be claimed by prescription appears from *Manwood* (2); and in the Exchequer Decrees, which were put in evidence in this case, several instances are found of warren of conies claimed by prescription.

If the term "warren," or "free warren," does not necessarily pass the soil over which the warren extends, much less can a warren of a limited character, as a "warren of conies," have that effect. It was argued, however, that such a warren as a mere franchise cannot exist in law, because a franchise cannot be divided. No authority was cited for this proposition, and one cannot see any reason for admitting it. Why should not the owner of a free warren be entitled to grant the exercise of a right to kill one kind of beasts of warren, and describe it as a warren of that particular kind? What injury can the owner of the soil over which the warren extends sustain by this division of the right? But it was farther argued on the part of the Appellant that there could not be by law such a thing as a warren of conies. If this were really so, it is strange that from the 10 *Henry* VIII. down to 1799, when the grant to the predecessor of the Appellant was made, there should have been a series of leases of the "warren of

(1) 12 Co. Rep. 22. (2) Forest Laws, tit. "Warren," p. 362–3.

conies" under this very description. The fact is, that, as *Manwood* says (1), conies were the principal beasts of warren, and the hare, the pheasant, and partridge seem to have been of little account, so much so, that in statutes passed to preserve beasts of warren, particularly the 3 Jac. 1, c. 13, and 23 Car. 2, c. 25, conies only are mentioned.

The Counsel for the Appellant relied upon the terms of the grant, and of the leases which preceded it, as being inconsistent with the description of a franchise, and argued that they could only find their proper application by including the soil itself as part of the grant. To support this argument they entered into a close and critical examination of the leases, and produced various instances of expressions used in them, which they said were inapplicable to a franchise. It is unnecessary to follow them in detail through these observations. It will be sufficient to say that they offered as instances on which they relied, the words "held and enjoyed" and "rights, members, and appurtenances," which they said could not be used in connection with a franchise; and yet, if a franchise is a tenement, why may it not properly be said to be held and enjoyed? and if a right to make burrows is incident to a warren of conies, which it appears by the authorities to be, the words "rights, members, and appurtenances" are not inaccurately applied. Again, the words "surrender" and "yield up" are said to be inappropriate to a franchise. But why? When the lease expires the lessee, by discontinuing the exercise of the right, virtually surrenders and yields up the franchise. Reliance was also placed on the stipulation, that at the end of the term the lessee should leave and yield up the warren sufficiently stocked with conies, as inapplicable to a franchise. But upon what ground? Why should not the lessee be required not to exhaust the conies, but to leave the franchise so as to be capable of beneficial enjoyment?

The point, however, most insisted upon in proof that the soil passed by the leases and the grant, was that by a lease made in 13 *Charles* II., after demising the warren of conies with the appurtenances, it is added "with all that lodge or house thereon built;" and in the grant of 1799 the words are, "and that house

(1) Forest Laws, p. 363.

1873
EARL BEAUCHAMP v. WINN.

or lodge thereupon built, commonly called *Bromby Lodge*." It was contended that this clearly shewed that the soil was intended to pass, because the word is "thereupon" built, and a house, it was said, cannot be built upon a franchise, but only upon land. Now all this seems to me to be extremely hypercritical. It does not appear by whom this house or lodge was built. It might have been by the owner of the soil for the better enjoyment of the franchise. If that was so, and the house or lodge was intended to pass with the warren of conies by the lease, what more apt words could have been employed to describe it? Why might not the word "thereupon" be used as descriptive of the local position of the house or lodge as within the extent of the franchise?

The critical argument even proceeded so far as to assert that the words "which said warren of conies extends itself in and over the wastes," &c., prove that the soil passed, because a franchise can have no extension. I really could not comprehend this argument. The franchise is not unlimited, and if there are limits assigned to its exercise, it may properly be said to extend itself, or to be contained (which is the same thing) within these limits.

The whole of the argument founded upon the terms of the leases and the grant was met by shewing that from first to last the owners of the warren have never claimed or attempted to exercise any rights as to the soil. They have invariably acted as being merely in possession of what may be shortly described as a rabbit warren. This was distinctly admitted by the Solicitor-General, who said, if the soil did not pass to the Earl under the grant there has been no such possession of it as to give a title by wrong. Now, both privately and publicly, when the right was exercised, and when it was formally claimed, it was always limited to a right in respect of the conies. The leases which were made by the owners of the warren were of the right of breeding and killing rabbits. Under two Inclosure Acts it became necessary to state the nature of the claim upon which allotments were to be made. In 1801 the *Ashby Inclosure Act* passed, and *Thomas Pindar*, the grantee, in the Duchy grant of 1799, claimed and received an allotment for a right of warren over the *East Common*. Again in 1831, the *Frodingham Inclosure Act* passed, and again the claim for an allotment was founded on a right of warren for conies. That the right

was limited as described, appears to me conclusively proved by the Parliamentary survey of the manor and soke of *Kirton*, in 1649, in which is contained, amongst other subjects within the manor, "all that warren or game of conies in *Bromby* and *Redburne*." Afterwards, in the particulars of sale of the estates of *Charles* I., produced from the Exchequer Augmentation Office, the same description is found, with the addition that the burrows extend themselves a certain distance into the wastes or moors adjoining to the fields of *Frodingham* and *Scunthorpe*. All this furnishes the most satisfactory evidence that the warren of conies granted to *Thomas Pindar*, in 1799, did not pass the soil of the wastes and commons in and over which it extended.

But, supposing this to be a correct conclusion, the counsel for the Appellant found another objection upon it. They say, that under the Act empowering the Duchy to make sale of its possessions, no power is given to sell a franchise. If this objection were to be held good, nothing could have passed by the grant of 1799; and it therefore strikes at the root of the Appellant's title. But there is really nothing in the objection. It is founded upon the construction put by the counsel for the Appellant on the words of the 57th section of 38 Geo. 3, c. 60, which empowers the Surveyor-General of the Duchy of *Cornwall* to contract for the sale of "the manors, messuages, lands, tenements, rents, tithes, mines, minerals, collieries, woods, wood grounds, fens, marshes, or waste grounds," belonging to the Duchy. It was argued that the word "tenements" has here a restricted meaning, and that it must be construed in its popular sense of a building. But if that is so, it is rendered entirely superfluous, because the word "messuages" is mentioned just before it in the section. It appears to have been the intention of the Act to enable the Duchy to dispose of every possession which was a source of revenue, and the clause itself (as well as others), speaks of "manors, messuages, lands, tenements, and other revenues." I have no doubt that the word "tenements" in the Act must be taken in its fullest sense, and as *Blackstone* says (1), "though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense, it signifies everything that may be holden,

(1) Com. Bk. ii. c. 2, p. 16.

1873
EARL BEAUCHAMP v. WINN.

provided it be of a permanent nature, whether it be of a substantial and sensible, or of an unsubstantial ideal kind." That a rabbit warren which passes no interest in the soil, but merely gives a right of entering within the limits of the warren to kill rabbits, is a tenement, was decided in the case of *Rex* v. *The Inhabitants of Piddletrenthide* (1), cited by the counsel for the Respondent.

Secondly: The question of the right to the mines and minerals in the fields of *Frodingham* may be disposed of very shortly. As it has been shewn that no part of the soil of the wastes or commons over which the warren of conies extended passed under the grant to *Thomas Pindar*, it remained in the Duchy, and was granted to Mr. *Angerstein*, the predecessor of the Respondent, by the grant of the 6th of July, 1799, of the manor and soke of *Kirton*. That grant includes, in the most general and comprehensive words, all "wastes, waste grounds, mines, quarries, &c., to the manor and soke of *Kirton* in any wise belonging or appertaining, or reputed, accepted, taken, or known to be part, parcel, or member of the same." There is no doubt that the fields in *Frodingham* are within the ambit of the manor and soke of *Kirton*, and if they were in the Duchy at the time of the grant to Mr. *Angerstein* they passed to him. The Appellant's ground of claim is, that these fields were purchased by *Thomas Pindar*, which has been shewn not to be the case. It has also been mentioned that under the *Frodingham Inclosure Act* the Appellant's predecessor claimed only a right of warren of conies, while Mr. *Winn* had an allotment made to him as the owner and proprietor of the soil of the commonable lands and waste grounds in his character of lord of the manor and soke of *Kirton*.

This brings me to the last question, which has occupied a considerable time in argument, and upon which there has been brought forward a large mass of documentary evidence. I propose to consider it as a question, whether the Respondent was entitled to any rights and interests over that portion of the *East Common* which he gave to the late Earl as one of the subjects of exchange. I put the question in this shape, because it appears to me that if Mr. *Winn* possessed any such rights and interests over the *East Common* given by him in exchange, it is a matter of no

(1) 3 T. R. 772.

importance whether he possessed them as lord of the manor of *Bromby* or not.

The question whether any manor of *Bromby* ever existed, or whether there was ever a reputed manor of *Bromby*, is left in considerable obscurity. But if there was any such manor, or reputed manor, I think it is shewn from the earliest documents that it was within and part of the manor and soke of *Kirton*. The question whether the manor and soke of *Kirton* is the name of the same lordship, or whether the boundaries of the manor and of the soke are different, has been strongly contested. Without examining the documents in detail, I think it is plain that the manor and soke of *Kirton* was the name of one manorial lordship. It is worthy of remark, that in the grant from the Duchy to *Thomas Pindar* what is granted to him is stated to be parcel of the lordship and soke of *Kirton*. In his petition for the sale to be made to him he calls it the lordship *or* soke of *Kirton*, as if either name might be used to describe it. The documents shew that the manor and soke of *Kirton* consisted of four wapentakes, one of these being that of *Kirton*, which appears to have been sometimes erroneously called the manor of *Kirton*, giving rise to the impression that the *manor* and *soke* of *Kirton*, by which name the paramount manor was called, were distinct from each other.

There is mention made of a manor of *Bromby* for the first time in the will of *Nathaniel Fiennes*, in 1669, and afterwards in that of his son, *Nathaniel Fiennes*, in 1672. And in 1705 a conveyance was made of the manor, or reputed manor, of *Bromby*. Again there was a conveyance in the same terms in 1733, and a term of 1000 years was created in the manor, or reputed manor, for the purpose of raising money. The money was afterwards raised, and two mortgages were executed, which were paid off by the Appellant's predecessors in 1853.

Notwithstanding these several dealings, nominally with a manor, or reputed manor, of *Bromby*, I think it is proved that such a manor could not have existed. In Domesday Book there is an account of a manor in *Chirchetone* (which is *Kirton*), and in the enumeration of the soke (as it is called) which pertains to it, there is mention made of *Brunebi* (which is *Bromby*) as containing five carucates held of the manor. By an *inquisitio post mortem* of

1873

EARL BEAUCHAMP v. WINN.

Edmund, Earl of *Cornwall*, in the 28 *Edward* VI., it is found that he held of the king *in capite* the manor of *Kirketon*, which manor with the soke is stated to be of the ancient demesnes of the king. And amongst the lands within the manor *Bromby* is mentioned, thus: "and in *Bromeby* 41 bovates of land, which render yearly ten pounds five shillings." It appears that at this time *Bromby* was not a manor, and this being ten years after the statute of *Quia Emptores* (18 Edw. 1) it never could have become a manor afterwards. This *inquisitio post mortem* shews that a certain quantity of land in *Bromby* was within the manor with the soke of *Kirton*, and that it yielded to the lord a rent of £10 5*s*. It appears by various ministers' accounts, rendered from time to time from the reign of *Henry* IV. to that of *Charles* I., that the sum of £10 5*s*. was accounted for in respect of the same quantity of land in *Bromby* as is mentioned in the inquisition. The form of all these accounts is very nearly the same. They are headed "*Kyrton-in-Lindesey*," and are generally described as the accounts of divers ministers of the lord the king, as well of the soke as of the base tenure of the manor of *Kirton-in-Lindsey*. With respect to *Bromby*, they shew that it is in the wapentake of *Manley*, and the gains received by the bailiffs and tackmen of this wapentake are in some of the accounts stated to have been delivered to the Reeve of *Kirton*, who accounts for the same. All of these ministers' accounts charge the receivers with the sum of £10 5*s*., as the rent of forty-one bovates of land in *Bromby*, being the exact quantity of land and amount of rent stated in the *inquisitio post mortem* of 28 *Edward* I. In these ministers' accounts of the issues of the manor and soke of *Kirton* there are found returns of receipts from the farm of the warren of conies in *Bromby*, described sometimes as lying within the moor called the *East Moor*, and at others as lying within the waste or moors of *Redbourne*, *Frodingham*, *Scunthorpe*, and *Asheby*. Some of the old leases of the warren of conies describe the warren as being parcel of the manor and soke of *Kirton*. And the later leases of the warren, beginning with that in 1716 to *Matthew Pindar*, invariably described it in the same manner as "parcel of the manor and soke of *Kirton*." In the survey of the manor and soke of *Kirton* in 1787, amongst the list of townships in the soke, *Bromby*

is mentioned as being in the wapentake of *Manley*, and containing 845 acres, and as held at a rent, called Prince's rent, of £10 9*s.* 7*d.*, which is very nearly the same amount of rent as the £10 5*s.* stated in the *inquisitio post mortem* of 28 *Edward* I.

It was argued on the part of the Appellant that the manor of *Kirton* was distinguishable from the soke of *Kirton*, the boundaries of the manor being much less extensive than those of the soke. But it appears by the survey of 1787, to which I have just referred, that *Kirton* was one of the four wapentakes into which the soke was divided, and that there was also a township of *Kirton* in which a Court of great antiquity, and (as is said in the survey) "of great power," was formerly held, which may account for a manor by reputation having grown up there. This Court, however, was the Court of the manor and soke of *Kirton*, and that the *Kirton* within the smaller limits, even though a reputed manor, was within the ambit and part of the manor and soke of *Kirton* appears from a lease to *Robert Pindar*, in 1789, of the manor of *Kirton-in-Bromby*, which is described as being "part and parcel of the manor and soke of *Kirton-in-Lindsey*."

That *Bromby*, whether a manor or reputed manor, was also held of the manor and soke of *Kirton*, appears from what has been already said, and it is farther confirmed by evidence derived from the Parliamentary Survey, in 1649, of the manor and soke of *Kirton*, to which reference has been already made. In this survey there is an account of the quit rents due to the lord of the manor from the freeholders within the townships holding of the manor, and the first on the list of freeholders in *Bromby* is *Nathaniel Fynes*, his rent being £7 4*s.* 7*d.* This *Nathaniel Fynes* (or *Fiennes*) is the devisor in the will of 1669, in which the manor of *Bromby* is devised. The rent stated to be chargeable in this survey has become, in some unexplained manner, reduced to £7 2*s.*, and has been payable and paid by the predecessors of the Appellant as Prince's rent due in respect of the manorial rights on and over the townships of *Frodingham*, *Scunthorpe*, and *Bromby*.

It appears from what has been said that the existence at any time of a manor of *Bromby* is more than doubtful. But whatever the predecessors of the Appellant possessed in *Bromby* they held of the manor and soke of *Kirton*, and whatever the rights and inte-

1873
EARL BEAUCHAMP v. WINN.

rests of Mr. *Winn* over the portion of the *East Common* in *Bromby* may have been, they passed to the late Earl under the agreement for exchange. Even assuming a misdescription of the character in which Mr. *Winn* professed to deal with these rights and interests, it did not prevent their being transferred to the late Earl, and can form no ground for setting aside the agreement for exchange.

I entertain no doubt that the decree of the Lords Justices is right, and that it ought to be affirmed.

LORD COLONSAY, after stating the nature of the case, said:—

It was contended on the part of the Appellant that the expression being "warren of conies," and the expression not being "right of warren," or "right of free warren," it must be held to imply a grant of the soil. No authority was cited in support of that. At the same time I observed that the Solicitor-General, in his very able and ingenious argument, very commonly transposed the words, and said that "warren of conies" was just "coney warren" or "rabbit warren." I do not think we are entitled so to change the words, any more than we should be entitled to import into the grant the words "right of free warren." We must take the words as we find them. It does not follow that they import the same thing.

It did not appear to me to be clearly made out, even by the reference to Lord *Coke*, that there was any positive rule that the expression "warren," necessarily carries the soil. On the contrary, under certain circumstances it might do so, and under other circumstances it might not do so. We have now to consider whether, as here introduced, it did or did not carry the soil. If it was a name descriptive of a particular piece of land, and was so known as descriptive of that piece of land, it might carry it. It might be "coney warren of *Bromby*," meaning "that piece of land known as the coney warren of *Bromby*." It would certainly carry the soil if the word "land" had been introduced. Such a term as "that cow-park," or any other description of that kind, might carry a certain piece of soil. But it does not follow from that, that "a warren of conies" would carry it; that is a very different thing. A "sheep pen" and a "pen of sheep" are two different things. Therefore we must take the words as we find them. "Warren of

conies" seems to me to be an expression which rather indicates a right to the conies than a right to the soil.

It is said that it cannot be a right of franchise in the warren because a right of franchise is indivisible. It comprehends not only the right to kill conies, but the right to kill various other animals, including hares, pheasants, woodcock, partridges, and other animals which are there. It is argued that, that being a general and indivisible right, "warren of conies" cannot be held to have been used in reference to a franchise; and if it could not be used in reference to a franchise, it must have been used in reference to the soil. It may be an improper expression in regard to either of them. I do not think it is a very good expression with regard to a right to the soil. That might have been much better and more clearly described, and although we have heard a great deal about conveyancing in this matter, I think that any conveyancer would have found no difficulty in avoiding the ambiguity which has given rise to this action.

I therefore think that we must look to all the circumstances attending the grant. Another circumstance referred to was, that it is described as having a house "thereupon;" and it is also described as "extending itself" for a certain distance. Now, it is quite plain that, whether you view it as a right to the soil, or as a right to exercise a franchise, that right must extend over a surface. It must have a geographical limit. It may well be that a person giving a right to another to destroy and kill conies within that geographical limit, may also give that party a right to a house for his convenience, and describe it as "thereupon," that is to say, within the geographical limits over which the right extends, because there must be a limit in point of surface—a superficial limit. The same observation applies to the expression "extending itself" so and so. I do not think that carries us far in the solution of this question.

Some other criticisms of a similar kind were made, but they seem to me to be merely criticisms on expressions that are consistent either with the one view of the case or with the other. I rather think that the expression "warren of conies" is an expression which does apply to the right to kill those animals. As to the indivisibility of the franchise, in the first place, I do not see

1873
EARL BEAUCHAMP v. WINN.

that there was any direct authority quoted for the indivisibility of the franchise. I do not think that that is to be taken for granted, I think that if a party has a right to the soil, and to the franchise, he may give a limited right in the franchise to another. I see nothing to prevent that being done. And as to describing it as a "warren of conies," it may be that, although a right of warren generally gives a right to kill all sorts of animals, yet it may be a good description if there is power to limit it; or if there is no other animal known there except conies. Conies may be the principal and the most valuable animals in the warren, and then it is a sort of assurance that it is a right of warren to kill conies.

But it appears to me that the important matter is, that no claim or exercise of right over the soil has been made with reference to this grant of "warren of conies." It was never regarded as conveying such a right, and on several occasions it has been treated otherwise. The parties themselves have proceeded on this footing. I do not mean to say that the party has studied his title, or the terms of this grant; but he knew something of his rights. His agents must have done so; but no person seems to have pretended until lately that there was any right beyond that of the stray of rabbits. In particular, attention was called to the circumstance that there are references to this right going far back in similar terms—going back for centuries—and in particular there are references to it in the proceedings under the Inclosure Acts of 1801 and 1831, in which the parties were put to state their respective interests, and then the one was represented as an interest in the stray of conies, and the other was represented as an interest in the soil. I think that must be conclusive with regard to this point.

The next point was with regard to the right to the minerals in certain fields in the parish of *Frodingham*. It appears to me that this right could not pass to *Thomas Pindar*, if I am correct in the view I have taken with regard to the import and construction of the grant. I think, on the other hand, that the grant to Mr. *Angerstein* a few weeks afterwards of the manor and soke of *Kirton* was so very broad and comprehensive in its terms that it must be held to have comprehended this property. The same observation which I have made already with regard to the Inclosure Acts, particularly the Act of 1831, applies here. It appears that Mr. *Winn*

then got an allotment as owner of the soil and waste ground, as lord of the manor of *Bromby;* while, on the other hand, the Appellant's predecessor only pretended to have that species of right which I have alluded to.

The only other point in this matter that I need allude to is as to the manor of *Bromby.* The facts as to this manor are obscure in all respects, and particularly obscure in this respect, as to whether there ever was such a manor or no. It is almost impossible to solve that question, but I think the solution of this part of the case which has been given by my noble and learned friend who has just spoken is quite a sufficient one. If all the rights which belonged to the Respondent in that common of *Bromby* have been given to the Appellant, he has got everything that was there; whether it was in the one capacity or the other, he has got it, and that is not a ground for disturbing the grant.

My Lords, I concur in what has been said as to the attempt to estop the Appellant on the ground of acquiescence or lapse of time. Acquiescence there could be none properly in any case, unless there was a knowledge of that which was acquiesced in. I think there is some ground for holding that there was not that knowledge here. And as to lapse of time, no authority was cited to shew that, if this right did exist, the party who has allowed the other to acquire it without knowledge on either side would be estopped by lapse of time; I think it would be a strong thing to hold that. But being of the opinion I have expressed upon the merits of the case, I do not think it necessary to make any remarks on that matter.

On the whole, I think that the view which has been expressed by my noble and learned friend who is now upon the woolsack is the one we ought to take, and I therefore concur in the judgment which has been proposed to your Lordships.

LORD O'HAGAN:—

My Lords, the exhaustive and lucid statement made by my noble and learned friend who first addressed your Lordships appears to me to dispense with the necessity of my going at length into the evidence in this case, and also into a consideration of much that was urged very ingeniously at the Bar. But I do think that

1873

EARL BEAUCHAMP v. WINN.

the importance of the case rather than its difficulty, after a full consideration of it, requires that we should apply ourselves to making clear what is the true construction of the certificate of March, 1799; and to that question mainly I shall address myself. According to our view of the effect of that certificate must be our view of the right of the parties; and all the voluminous proof, and all the minute criticisms on ancient and modern documents which have been properly addressed to us, are of force and value only in so far as they may assist us to construe that certificate correctly.

The Appellant, Earl *Beauchamp*, claims through his predecessor *Henry*, by whom in 1864 the agreement for exchange which has been so fully stated was made with the Respondent, Mr. *Winn*. That agreement was entered on and possession taken under it, though no deeds were executed to carry out its provisions; and one of the grounds of the Respondent's contention was that there had been such irrevocable change so wrought in the relative position of the parties as to put it out of the power of either now to bring his bargain into controversy. This the Appellant denies, and I think with reason, and insists that the agreement was the fruit of a mutual mistake, which was not discovered until it had been signed and partially carried out. He says the instrument of the 27th of March, 1799—a certificate of contract of the Duchy of *Cornwall* operating under the statute 38 Geo. 3—conveyed to *Thomas Pindar*, under whom he derives through Earl *Henry*, and his heirs and assigns, the soil and the mines and minerals underlying it in the *East Common* of *Bromby* and in *Ashby* and *Frodingham*. On the other hand, the Respondent denies that the conveyance had any such effect, but, on the contrary, claims for himself the lordship and mines and minerals of the *East Common* and *Ashby* and *Frodingham* under a subsequent certificate of a like kind, of the 9th of July in the same year, 1799, from the Duchy of *Cornwall* to *John Julius Angerstein*, whose interest, whatever it was, is confessedly vested in him; and he asserts that the Appellant has nothing but a franchise of warren, giving him a limited right over, but not in, the lands in question. There can be no doubt that the latter view was common to the parties when the agreement was entered into, and for more than sixty years before; and the sub-

stantial question is, was that view really founded in mutual mistake working an injury to the Appellant, which in equity ought to be prevented or redressed, or is it sustained by the true interpretation of the grant made in the same year and by the same authority to the predecessors of the litigants respectively?

In the view which I have felt myself constrained to take of the case, many of the questions which have been most elaborately argued at your Lordships' Bar become utterly immaterial. The question as to the distinction between mistakes of law and fact, and as to the extent and nature of the jurisdiction of a Court of Equity when either has been known to exist, is of no account if we reach the conclusion that in the case before us there was no mistake whatever. And that conclusion also relieves us from the necessity of considering a matter on which we had much elaborate and learned discussion, namely, whether the Appellant and those under whom he derives have, by their own conduct, their laches or acquiescence, disentitled him to the intervention of Equity for the purpose of establishing a claim which was for so long a time in abeyance, although those who might have asserted it had unquestionably, if not actual knowledge, at least the means of knowledge of its existence in their possession, or at their command, at all times during that lengthened period, and were precluded from putting it forward by no legal disability or incapacity of legal action. And so, if there was no mistake on either side, we are relieved from the obligation of considering the effect of the conduct of the parties after they entered into the agreement of 1864, and whether the change in their mutual relations, consequential on that agreement, was of such a character, and so inconsistent with their substantial restoration to their original positions, as to make it inequitable that the Appellant should now be allowed to rest upon a title on the faith of the non-existence or abandonment of which the Respondent had waived rights or assumed liabilities.

It seems to me that we may clear the ground of these considerations and all the controversy they have created, if we can determine satisfactorily in the Respondent's favour, that there was not in reality any mistake at all. I do not believe that there was any; and it is not to be forgotten before we proceed to consider the true construction of the instrument of 1799 which must decide the

1873
EARL BEAUCHAMP v. WINN.

controversy, and from their bearing on which the multitudinous documents and facts so ably pressed on our attention derive their sole importance, that from the execution of that instrument down to the year 1865 not only did the Appellant's predecessors sleep upon their rights, if rights they had, such as are now asserted, but it is perfectly plain, and proved by a series of solemn acts, that none of them ever dreamt of the existence of such rights. And, although if we were now convinced that the certificate of 1799 passed the soil and everything under it and not a mere franchise, I should be inclined to concur with my noble and learned friend that neither laches nor lapse of time, nor alteration in the relations of the parties, should preclude us giving the Appellant what on that assumption would be his right, it is very material if we are not so convinced, and if there be real ground for doubt as to the construction to be put upon it, that we should take into account what that construction was assumed to be when the certificate was granted, and for so many succeeding years.

About this there can be no doubt. Contrasting the terms of the instruments of March and July, 1799, we find the first disposing of the "warren of conies" in *Bromby* and *Redbourne*, called by the name of *Bromby Warren*, and extending themselves over the wastes of *Bromby, Frodingham, Scunthorpe*, and *Ashby*;" but with no reference to mines or minerals, and confessedly no conveyance of the soil, unless it be effected by the use of the word "warren." On the other hand, the certificate of July, disposing of the Manor and Soke of *Kirton*, gives expressly *inter alia* the "wastes, woods, grounds, mines, and quarries to the manor and soke belonging." And it is plain that these words, clear and unequivocal as they are, entitle the Respondent, as representing Mr. *Angerstein*, to the property now in controversy, unless we hold that it passed by a description of which, at least, it may be said that it was not clear and unequivocal. Both the certificates were given by the same Surveyor-General in the same year, and they were singularly framed, if it was meant that the first should prevent or defeat the rights apparently bestowed by the second.

And in accordance with this view was the subsequent conduct of the parties, their continuous and consistent conduct down to the year 1865. It is not pretended that the Plaintiff's predecessors

ever acted as the owners of the soil, or in any other capacity than as the owners of a franchise. All their proceedings in granting leases, in making claims and otherwise, went on the assumption that they were nothing more. In the *Ashby Inclosure Act*, 1801, whilst *Angerstein* is described as lord of the manor and soke of *Kirton*, *Thomas Pindar's* claim is stated as being that of a "right of warren." And in the feigned issue of 1802 following upon that Act he states his title to be "a right of warren" extending over the *East Common* in the township of *Ashby*. And so things remained until the *Frodingham Inclosure Act* was passed in 1831; and under it also Earl *Beauchamp* claimed "that warren of conies or *right* of warren of conies" in *Bromby*, "that warren of conies or *right* of warren of conies in *Redbourne*," under the certificate of 1799. And so he appears to me to have put his own construction on that certificate by interpreting the words "warren of conies" to mean "right of warren"—an interpretation which could hardly have been given to them if they conveyed to him not a mere franchise, but the absolute property in the soil. There does not seem to be anything ambiguous or equivocal in those claims. They clearly pointed to the right of warren which had alone been asserted under the certificate of 1799, and they received sanction and validity as such by force of the several statutes. And so, from 1831 until the negotiation for an exchange in 1864, the parties remained in the same position. And the case of the Plaintiff himself is, that down to 1865 his predecessors never imagined they had any claim to the mines and minerals, or any right to dispute the title of the Defendant.

The acts of the parties and their own conceptions as to their respective rights may not determine the construction of a written instrument; but it is not immaterial in this case to observe, if its meaning be open to dispute, that the course of events since 1799 deprives the Appellant of the possibility of relying on any possession or any acts of ownership, and confines his claim to whatever may have been dealt with by the certificate of the Duchy. And that, if we were at liberty to construe that certificate according to the mind of the persons by whom it was given and received, or the nature of the enjoyment which followed upon it, contemporaneous acts and documents leave no room for doubt that the Respondent's

1873
EARL BEAUCHAMP v. WINN.

view of it, accepted by the Master of the Rolls and the Lords Justices, ought to be maintained by your Lordships' House.

But we are bound to look at the certificate itself, and consider what is the true legal effect of the grant of "that warren of conies" which it contains—[His Lordship read the words, see *ante*, p. 224.] The Appellant contends that the grant of a "warren" carries with it a right to the soil and all things under it. The Respondent says that it gives a mere franchise, limited in its extent, and conferring no such right.

The franchise of free warren generally was in the Duchy of *Cornwall;* and it is one of the points insisted on by the Appellant that such a franchise cannot legally be split up, so as to enable its owner to grant or to lease warren of a particular kind. And, as I understood the argument, it was contended that though free warren generally might give a franchise to a person without interest in the soil, warren of a particular sort, as warren of conies, must be taken to give such an interest. I did not quite appreciate the force of this reasoning. Although authority was repeatedly asked for to support the proposition on which it was founded, no such authority was produced, and I am not aware that any is in existence. There seems nothing in principle, or in the nature of the thing, to prevent the owner of a free warren parcelling it out so as to vest in various persons various new contracted rights as to the several animals—the partridge, the pheasant, the hare, and the rabbit—comprehended within the scope of the general franchise. Indeed, so far as authority has touched this point, it appears to be against the Plaintiff, and not in his favour. The case of *Rex* v. *Parish of Piddlethrenthide* (1), and the several decrees in the Exchequer on which reliance has been placed, appear distinctly to recognise a "warren of conies" as a franchise capable of legal existence and effect. And although, of itself, this circumstance would not be decisive if the Appellant's position were otherwise maintainable, the multitude of leases and documents in the very case before us, in which, through a succession of centuries, the "warren of conies," or the "game of conies," has been made the subject of royal grant and of claims allowed under Acts of Parliament, would naturally make us pause before

(1) 3 T. R. 772.

1873

EARL BEAUCHAMP v. WINN.

admitting that position. But it appears to me unsustained, save by the strong assertion of its accuracy at the Bar.

This being so, we are brought to the real question: What, according to its true construction, was granted by the instrument of March, 1799? Was it a mere franchise, or the soil of the wastes over which it would extend? It has been said repeatedly that a "warren of conies" is merely a rabbit warren; that a rabbit warren, in common acceptation, is the place in which the rabbits burrow; and that the owner of the rabbit warren is owner of that place and all things under it. And, popularly speaking, this may be true. But when we are asked to construe a legal instrument, to be interpreted according to the sense which the law ascribes to its phraseology, I think an argument like this is inadmissible and can only create confusion. The word "warren" has a definite legal meaning; and although it may sometimes serve to indicate a place, it undoubtedly also serves to indicate a franchise, separate from, and not necessarily enjoyable or passing with, the estate in the soil.

I do not mean, after the clear statement of the effect of the authorities directly bearing on the point which has been made in the Court below and by my noble and learned friend, to occupy time by discussing them minutely. They are very few, and seem to me to result clearly in this, that the term "warren" may, under certain circumstances and in certain collocations, be held to pass the soil, and in others it may not. The passage in *Coke* on *Littleton*, of which so much has been made, as attaching always to the word the force of such a grant, applies expressly to the case of a warren "in a man's own ground;" and even so, it is cut down in its operation by the explanatory addition in *Preston's Sheppard's* Touchstone, "generally, without any qualification or context." All depends upon the presence or absence of such context or qualification. It is impossible to contend that in all cases the land and the warren go together, as was apparently the contention of the Appellant's counsel. It is expressly decided that "a person may have a warren in another's land, for one may alien the land and reserve the franchise;" and "a warren is a privilege distinct from the land, and by a lease of the land without more does not pass"(1);

11 Ch D 83

(1) 8 Co. Rep. 108; 11 Co. Rep.

1873
—
Earl
Feversham
v.
Watts
—

and again, "free warren" in gross whereof a grantor is seised, will not pass by a grant of a manor and the appurtenances: *Morris* v. *Jones* (1). And *Blackstone* says (2), that a man who has had a franchise of warren "is in reality no more than a royal gamekeeper."

If, therefore, in some cases, "warren" may designate the soil, in every case the context and the qualification must be taken into account before we determine that actually it does so. Now, in the certificate before us, the word "warren" does not stand alone. It has a significant context. The instrument first deals with land, *to wit*, woodland containing a certain number of acres, and pasture land, also of a specific admeasurement; and then, separately from these and in contrast with them, we have "warrens," but not warrens simply, but "warrens *of conies*," with their rights, members, and appurtenances; not described like the woods and pasture, as land and by quantity, but as extending themselves "in and over the wastes and inclosures of *Bromly, Framlingham, Swathorpe*, and *Ashby*." It seems to me that the description in itself, and by contrast with that which precedes it, indicates that the right to the conies, and not the right to the soil, was in the contemplation of the grantor. And I think it will be still more manifest when we look to other documents in evidence, that the "warren" was not the land, but, in the words repeatedly employed to interpret it by the Appellant's predecessors, the right of warren *of conies*, *i.e.* the right, or privilege, or franchise to breed and take and use the conies; and that the warrens "extending over" wastes were not the wastes themselves over which they so extended. To my mind the context qualifies and explains the word, and makes it manifest that the respective parties to the two certificates of 1730 were under no mistake when, for nearly seventy years, they held undoubtingly, with every opportunity of knowledge, that Mr. *Fludyer* took only a franchise, and Mr. *Anperson* obtained the property in the soil.

The warrens extended "in" and "over" the "wastes," that is, within the ambit and over the surface of the wastes: or, giving "in" even a larger signification, we may conceive it to warrant a dealing with the soil as far as the purposes of the franchise might require, for the breeding and habitation of the conies: but no

(1) 3 Nev. & M. 674. (2) 2 Com. chap. 3.

farther. But why, if the wastes were meant to pass, language was employed so capable, at least, of being held to point to a mere franchise of warren, when the same sort of description which had been given immediately before, of the woodland and the pasture land, might have been, but was not, repeated, though its repetition would have taken away all possibility of ambiguity or error, I have been unable to comprehend.

It has been said and urged upon the House, with great force and iteration, that there are other words in the description of the warrens which are inconsistent with the notion that it did not point to a conveyance of the soil. Thus they are described as being "in *Bromby* aforesaid;" and it is argued that a mere right or franchise cannot be properly in a place, and therefore we must deem the warrens to have material attributes, such as may make them capable of "local habitation." But surely there is nothing unreasonable in suggesting that, where the exercise of a franchise is necessarily local, and confined within certain boundaries, it may be dealt with as a right which has its existence within and not beyond them. Whether a grant be of a chase, or a forest, or a warren, the thing granted in it must be designated and defined with reference to a specified ambit, and whether it is said to operate within that ambit or to be within it, does not seem to me to matter much for the purposes of description. Besides the grant of a "warren of conies," though it does not necessarily give the soil and all beneath, does give the right to a certain dealing materially with the surface, as essential to the exercise of the franchise, in burrowing and otherwise, which, even to the most captious criticism, might afford reason for admitting that the "warren" was not unfitly described as being in the place in which such dealing was to occur. But I do not think it necessary to rest on this latter view. The argument does not appear to me to be tenable at all.

Another matter was greatly and repeatedly pressed, and not improperly. The certificate, after stating the agreement for sale of all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in *Bromby* aforesaid, goes on, "And that lodge or house thereupon built, commonly called *Bromby Lodge*." This description, it is said, necessarily implies

1873

EARL BEAUCHAMP v. WINN.

that the conveyance of the warren was a conveyance of the soil, inasmuch as a lodge cannot be built upon a franchise. There is plausibility in the argument, but no conclusiveness. In the first place the lodge appears to have been very ancient and very ruinous when the certificate was made; and no one knows when it was built or by whom; or whose may have been the property in the soil when it was erected. And in imaginable circumstances, it might have been exactly such an erection as the authorities point to, as proper to be made by the owner of a franchise on his own land. But next, although not, I think, decisive as to the intention of the grant, the observation is not to be disregarded that if by "that warren of conies, . . . in *Bromby*," the soil did pass, it was wholly unnecessary to make any reference to the lodge, which being upon the soil must, of course, have passed with it.

Then, if the view presented by the Respondent as to the general terms of the certificate commends itself to the critical reasoner, is there much difficulty in coming to the conclusion that the lodge "thereupon built" was intended, though the expression be somewhat awkward, to describe a lodge built within the limits, in the sense I have indicated, and for the purposes of the warren? The word "thereupon" is of equivocal application in our language. It may point to a physical superposition of one thing upon another, or, in a different collocation, it may indicate a relation or a result, having no sort of physical character. Thus we may say an orator addressed an audience, and "thereupon" they were convinced. It may stand for "therefore," or "for that reason," or "on account of that." Now a lodge is described as belonging to a warren, and it is said that a man having right of warren may build it on his own ground. We do not know, as I have said, when or under what circumstances, the old lodge in question here was erected. It may have been when the same person was the owner of the franchise and of the soil; and, if so, it would be quite conceivable that, dealing with the lodge as merely incident to the warren, after describing the latter, the grant should have proceeded to describe the lodge as having been built on account of and because of it, employing "thereupon" in the second sense to which I have alluded. And when we look to the Latin description of the lodge contained in the older leases of the same premises we find this

view curiously corroborated. This point was made in the course of the argument, and it struck me very much, so I looked into the question a good deal. These are the Latin words of which the English were clearly meant to be a translation: "*Cum totâ illâ logeâ vel domo superinde edificatâ.*" The word "*superinde,*" answers to and is translated "thereupon." And, according to *Ducange*, that word, at the very period at which the ancient grants and leases of this warren and the lodge were made, found its Latin synonyme in "*propterea.*" He gives an illustrative passage from letters patent of *Henry* VII. in the twenty-third and twenty-fourth years of whose reign a lease was made of the very warren in question; and it is not without significance as to the matter before us. "*Nos rata, grata, et forma habituros et observaturos, et* SUPERINDE *literas patentes novas aut confirmatorias . . . . daturos.*" There the word "*superinde*" is manifestly employed in the second meaning which I have attributed to "thereupon." It means "on that account," "for that reason," or "to that end." And may we not suppose that it was employed in a similar way by the framers of the old lease, whose phraseology was adopted when the Latin became English, manifestly without any view to change in the subject-matter with which it dealt, to shew that the lodge had been built "on account of," or "for the purposes of," or "because of" the warren to which it was attached and incident?

I have dwelt, perhaps too long, on this point, because it was pressed so strongly and repeatedly, and because it was fairly relied on as one of the most plausible in favour of the Appellant's construction of the certificate. For the reasons I have given I think it fails to sustain that construction.

There were also observations made on other expressions in the certificate to which I shall advert more slightly. It was said that the very name of "*Bromby Warren*" implied local extension and material existence which a mere franchise could not have. But I fail to see why a franchise or right of warren necessarily bounded by locality for the purpose of its exercise, and operating within, upon, and over that locality, should not be so described. Neither can I understand why it may not properly be said to have "rights, members and appurtenances." It may be legally described as a "tenement," and dealt with as such for legal purposes; and there

1873

EARL BEAUCHAMP v. WINN.

seems no impropriety in ascribing to it such attributes as those words imply.

Then it was argued that a grant of "all houses, edifices, structures, timber trees and other trees, mines, quarries, waters, water-courses, roads, ways, easements, profits, commodities, privileges, advantages, emoluments, and hereditaments whatsoever in or upon the said woods and lands, and the said warren and warrens of conies growing or arising to the same in any wise belonging" necessarily involved the assumption that the "warren" and "warrens" described the soil, and not a mere right over it, as there could be (the argument as to the lodge being repeated) no houses, edifices, and so forth, "in or upon" a franchise. But I find no difficulty *reddendo singula singulis* in referring the words "houses, edifices, &c.," to the woods and lands to which they might belong, and the privileges, advantages and emoluments, and hereditaments to the "warrens of conies" out of which they might be said to arise, and to which they might be said to belong, without any straining of sense or language. And the same remark equally, I think, disposes of the argument founded on the phrase, "the actual seisin or possession of the said woodland, pasture-ground, warrens, and premises." There may surely be "seisin" of the "woodlands and pasture-ground," or "possession" of the warren, and it is not necessary to construe the phrase as if seisin applied to all.

I have already adverted to the words on which the Appellant's counsel relied for the same purpose. "Which said warrens of conies . . . do extend themselves in and over the wastes, &c." It was said that a franchise would not "extend itself" over a waste, and therefore something different from a franchise must have been intended by the description "warrens of conies." But the same answer I have already given on another point again applies. The exercise of the right may extend "over" the wastes and "within" their ambit, and this is what is meant by the warren "extending itself." In another point of view, as I have said, the words "extend themselves in and over" the wastes, &c., rather sustain the Respondent's construction, that the wastes themselves and all belonging to them, could not have been meant to pass to Mr. *Pindar*.

I think I have adverted to all the points of the ingenious and elaborate criticism applied to the terms of the certificate by the Appellant's counsel, and I am of opinion that it has altogether failed to establish their alleged effect in conveying to him a right to the soil and the mines and minerals. I have reached this conclusion on a consideration of the terms of the certificate of March, 1799, and without reference to the acts of the parties and the other documents and evidence. Those acts and documents have, however, been largely relied upon in different aspects on either side, and it is satisfactory to find them, as I conceive, throughout confirmatory of the view which I have adopted in accordance with the judgment of the Court below. I have already shewn that for more than sixty years after the execution of the certificate it was the view accepted by all parties, whether it operated for or against their interests, and accepted, not by mere non-claim or acquiescence, but by positive and unequivocal action, by solemn instruments, and deliberate proceedings under statutes and in Courts of justice.

And if we now look at what occurred before the execution of this instrument, with relation to the property in question, we find that same view most singularly corroborated by grants, leases, and accounts ranging down from the reign of *Edward* IV. in unbroken series until the execution of the certificate. Thus we have the Exchequer Minister's accounts in that reign, which contain entries as to the profits of the "Farm of the warren of the soke of *Kirton*," manifestly pointing to an interest wholly different from any in the soil. And so, in a lease from *Henry* VIII. to *Thomas Wastlyn*, this very warren is let to him, and described as "*Warrena cuniculorum nostrorum infra vastum siva moras de Frothingham*, &c." Is it possible to conceive that by the description "Warren of *our* rabbits within the waste or moors," it was intended to demise the soil of the waste and moors? Is it not manifest that the rabbits, and not the soil, were in the contemplation of the parties who framed this ancient lease, and that the right to breed and take them was meant to be conveyed and nothing else? In the nineteenth year of the same king, another lease was made in the same terms. Queen *Elizabeth* demised to *Thomas Bellingham* the same warren, describing it as "*our* warren of conies;" and again to *Richard Masters*, varying the description of the same

1873
EARL BEAUCHAMP v. WINN.

thing to, "All that our warren of conies, and all and all manner the conies, with all the rights, &c., in *Burnabye*, in the county of *Lincoln*." Again, is it not manifest that the principal and real object of this demise was "the conies," and the right of using them. And if we were required to construe it alone, could any one reasonably contend that it meant to give the lessee not "the conies" only, but the land, with all the appurtenances, to which it makes no reference, either by description or admeasurement, or in any other way?

There can be no doubt, I think, that the subject matter, whatever it was, of the certificate of March, 1799, was also the subject matter of the conveyance by this lease, and by all the leases before and after it, for it is knit to them, and they to it, by recitals running through them all. Then we have "our warren of conies" in another lease of the 42nd of *Elizabeth;* and again in a lease of *Charles* I. And under the Long Parliament, which contracted to sell part of the manor of *Kirton*, the contract of sale describes precisely the same premises as "all that warren *or game* of conies in *Bromby* and *Redburne*, and within the wastes, &c." "Warren or game." What is the meaning of "warren," if "game" be its synonyme? Can it possibly have been meant to describe the soil? Or is it not plain that by the words "game of conies," conies as beasts of warren were made the principal and real subject-matter of the sale? *Charles* II. and *James* II. leased the same thing as "our warren of conys." And various successive leases were made of them to the *Pindar* family down to the month of March, 1777, when the last lease referred to in the certificate of 1799 was executed by *George* III. to *Robert Pindar*, demising in somewhat different and more extended phraseology, the woodlands and the "warren of conies" conveyed by that certificate, with a distinction significantly taken by the express demise of "all the lands, ground, and soil of the same woods, and every parcel thereof—and all profits, commodities, advantages, emoluments, and hereditaments whatsoever, in or upon the said woods or woodland, and the said warren of conies, in any manner growing or arising." The lands and ground of the woods—the profits and emoluments of the warren—because the soil went with the woods, and the conies only with the warren.

Various minute difficulties were suggested as to the construction of this lease of 1777. It was said that as the coney warren was to be stocked and stored, and delivered up at the end of the term, it must have been a material thing, and possessed the qualities of land. But I do not feel pressed by the force of that suggestion. The agreement to "stock" the warren would be satisfied by a supply of rabbits within the boundaries of the waste on which they were to live; and the "delivery up" would be identical with a cessation by the lessee of the exercise of the franchise. Even if, as was observed, there were passages in this lease hard to reconcile with that construction of the certificate which I have adopted, that would be no sufficient reason for hesitating to give the natural meaning to the terms of the latter instrument. But in truth I find the reconcilement easy; and the representatives of *Thomas Pindar*, who was sub-lessee under *Robert Pindar* of the lease of 1777, and became grantee in fee in 1799 of the premises comprised in that latest lease, have no reason to complain if they continue to possess precisely the same interest and enjoyment as were had for so many centuries of this "warren of conies" by successive leases, under successive sovereigns, before *Thomas Pindar* obtained his certificate. Not founding my opinion, therefore, on acts or documents *dehors* the certificate of 1799, I am glad that it finds such remarkable sustainment in transactions that are shewn with singular clearness to have run on with unbroken continuity for many hundreds of years.

I have occupied so much time in discussing what appears to me to be the really material question in the case, on account of its great importance, that I shall content myself, as to other minor portions of it, by expressing my concurrence in the conclusions reached by my noble and learned friends, and in the reasons on which those conclusions have been grounded.

The question as to the fields of *Ashby* does not appear to have been raised by the pleadings; and as to those of *Frodingham*, if *Thomas Pindar* did not take the soil under the grant of March, 1799, it must have gone to *Angerstein* under that of July in the same year. The mines and quarries which went under it, with the manor and soke of *Kirton*, belong to *Angerstein's* successor if they do not belong to the successor of *Pindar;* and the reasoning which

1873
EARL BEAUCHAMP v. WINN.

has satisfied me on the first part of the controversy satisfies me also as to the second. And if more were wanted, the nature of the claims of the respective parties under the Inclosure Acts, and the character of their enjoyment of the fields in question, without doubt or controversy, for so many years, appear to me abundantly to confirm the cogency of that reasoning as to those fields also.

There only remains the much-mooted question as to the existence of a manor of *Bromby*. That question is, in my mind, of comparatively little consequence; and so far as it can be considered to be of importance, I am quite content to adopt the observations of my noble and learned friend who first addressed the House. It appears to me that those observations were very clear and conclusive as to the nature of this manor, and upon the question of whether there was or was not a manor of *Bromby*. But by whatever name it may be called, I think the subject of the exchange, in this respect the property of the Respondent, passed under the agreement for the Appellant's benefit. Whether there was or was not a manor of *Bromby*, and whether the Respondent was or was not lord of that manor, what he gave was actually given; it was given as part of the exchange.

I am quite of opinion with my noble and learned friends that the Appellant has failed in every part of his case, and I would advise your Lordships that the appeal should be dismissed, and that our judgment should be given for the Respondent.

Order of the Lords Justices appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 15th May, 1873.

Solicitor for the Appellant: *H. H. Walford.*
Solicitors for the Respondent: *Baxter, Rose, & Norton.*

WILLIAM HILL AND W. C. SIMMONS . . APPELLANTS;

AND

ALICE SARAH CROOK AND ERNEST WILLIAM CROOK . . . . . RESPONDENTS.

1873
May 2, 5, 8, 27.

Will—Illegitimate Children.

The word "children" used in a will *primâ facie* means legitimate children, and no other meaning can be given to it by any conjectural application of other words found in the will and supposed to shew the testator's intention; there must be clear evidence of that intention in the will itself to establish another application of the word.

There may be a gift to living illegitimate children as a class, if the words used by the testator clearly shew that such children were intended to be the objects of his bounty.

But whether any such gift to future illegitimate children can take effect? *quære?*

If there is a gift to "children" as a class, the law, if there is nothing in the will clearly to shew a contrary intention, will apply the gift to legitimate children only.

A testator possessed of leasehold estates spoke in his will of *J. C.* as his "son-in-law," and devised these estates to trustees for the use of his "daughter *Mary*, the wife of *J. C.*," for her life, for her sole and separate use, independent of the debts or control of "her present or any after-taken husband," and in several places in his will mentioned *J. C.* and his daughter *Mary* in the same terms. After her death, and if she made no specific appointment, the trustees were to stand possessed of the leaseholds in trust for "the child if only one, or all the children if more than one, of my said daughter *M. C.*" . . . . "But if there shall not be any child of my said daughter *M. C.*" then over. There were children of the union of *J. C.* and *Mary* born and living before the testator's decease, and treated by him as his grandchildren, but that union was not a lawful marriage, *J. C.* having been formerly the husband of *Sarah Ann*, the sister of *Mary*, and having (with the knowledge and assent of the testator) gone through the ceremony of marriage with *Mary* after *Sarah Ann's* death:—

Held, that there was here a sufficient designation of the children of *Mary* as the intended objects of the testator's bounty, and that his gift to them was valid.

THIS was an appeal against a decision pronounced by the Lords Justices on the 16th of February, 1871, which had overruled a demurrer previously allowed by an order of Vice-Chancellor *Stuart*, of the 14th of July, 1869.

John Hill, on the 9th of March, 1859, made his will, the parts

1873
HILL
v.
CROOK.

of which material to this case were these: "I forgive to my son *W. Hill*, of, &c., and to *my son-in-law, John Crook*, of, &c., all sums of money due from them to me." . . . "And I devise and bequeath to my said son *W. H.*, and to *W. Simmons*, their executors, &c., all those my leasehold messuages, &c.," describing several in different places, and giving them on various trusts, one of which was the following: "Upon trust during such part of my term, estate, and interest therein as *my daughter Mary, the wife of the said John Crook*, shall happen to live, to pay the net rents, issues, and profits of the said last-mentioned hereditaments and premises unto her, *my said daughter Mary Crook*, or unto such person or persons as she shall from time to time, after the same shall have accrued due, by writing under her hand, notwithstanding her coverture, appoint as her agent or agents to receive the same, for her sole, separate, and exclusive use and benefit, independent of *her present or any after-taken husband*, and without being liable to the debts, control, or engagements of any such husband, the receipts in writing of her my said daughter, notwithstanding her coverture," being sufficient discharges, ... "and, subject as aforesaid, I direct and declare that from and after the decease of my said daughter *Mary Crook*, the last-mentioned hereditaments shall go, remain, and be upon such trusts for the benefit of all and every, or such one or more exclusively of the other or others of the children or child of my *said daughter Mary Crook* upon such conditions, &c., as she, my said *daughter Mary Crook* shall by her last will and testament in writing" appoint, and in default of appointment "upon trust for the *child, if only one, or all the children, if more than one, of my said daughter Mary Crook* who being a son," &c., shall attain twenty-one, or being a daughter, &c., "shall either before or after the decease of *my said daughter Mary Crook*, attain that age or be married," . . . "but no child of my *said daughter Mary Crook* shall be entitled," &c., except under certain conditions specially mentioned. "And I declare that in case my *said daughter Mary Crook* shall alien," &c., the premises, &c., "shall devolve upon the person entitled thereto next in order of succession under this my will, as if my said daughter *Mary Crook* were then dead, but without prejudice to the powers hereinbefore given to her my said daughter in favour of her children. But if there shall not be any child of

my said daughter *Mary Crook*," then to *Emma Hill*, another daughter of the testator. In several other parts of the will the daughter *Mary* was mentioned, and in every instance the words used were "my daughter *Mary Crook*."

The testator died on the 22nd of March, 1859. *John Crook*, spoken of in the will as "my son-in-law," had formerly been married to *Sarah Ann*, one of the daughters of the testator. She died in 1851, and in the beginning of 1854 *John Crook*, with the full knowledge and assent of the testator, went through the ceremony of marriage with her sister *Mary*, the person referred to in the will as "my daughter *Mary*, the wife of the said *John Crook*." The two Respondents were born of this union in November, 1854, and July, 1858. The testator had always treated these children on terms of affectionate kindness. At the date of the will *Mary* was pregnant with another child, of which fact the testator was fully aware, as he was in the habit of familiar intercourse with the family. This last child was born in June, 1859, about three months after the death of the testator, and received the name of *Robert*. *Mary* had afterwards another child named *Edward*, and she lived with *John Crook* as his wife up to the time of her death. She made a will in which she described herself as "*Mary Crook*, the wife of *John Crook*," and, under the power reserved to her in her father's will, bequeathed her property to her four children. She died in March, 1868.

On the 11th of May, 1869, the Respondents filed their bill against the two executors and the infant *Robert*, and thereby prayed "That it may be declared that the Plaintiffs, and, if the Court shall be of such opinion, that the Defendant *Robert Crook* are intended by the testator's will, to take as children of the testator's daughter, *Mary Crook*," and for general relief.

In June, 1869, the Appellants filed a general demurrer for want of equity.

On the 14th of July, 1869, the demurrer came on for argument before Vice-Chancellor *Stuart*, who allowed the same. The Plaintiffs appealed; and on the 16th of February, 1871, the Lords Justices reversed his Honour's decision (1). The case was then brought up to this House.

(1) Law Rep. 6 Ch. Ap. 311.

1873

HILL
v.
CROOK.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Speed*, for the Appellants:—

It is a rule of law that the word "children" in a will shall *primâ facie* mean legitimate children, and will not carry an estate to illegitimate children, unless there is an intention to that effect so clearly expressed as to leave no doubt about the matter. Mere conjecture as to the intention of the testator will not be sufficient to extend the gift so as to comprehend illegitimate children. And even if they were taken to fall within the intention of the testator, they could not take as a class, nor in any other character than as individuals specifically designated.

Applying these principles to the case of the will now before the House, it is clear that the claim of the Respondents, the illegitimate children of the testator's daughter *Mary*, cannot take any benefit under it. It will be alleged, on the other side, that the testator recognised *Crook* as his "son-in-law;" but that expression in the will is of small importance, for *Crook* had undoubtedly married *Sarah Ann*, the testator's daughter, and was therefore entitled to that appellation. He was not entitled to it on account of his union subsequently with *Mary*, and the will does not shew that it was given to him in respect of that union. It was merely the description of him which he had acquired by his marriage with *Sarah Ann*. But even if an opposite presumption should be made, still, as that union was not a lawful marriage, no words used by the testator could give it the character or incidents of one. It will be said that the testator knew all the facts, and that he intended to recognise the union as a marriage. If he believed it to be so, then his gift to the children, as to the children of a lawful marriage, would be void, for he would have been deceived in his gift, and would have erroneously described the objects of it; the gift, therefore, could not take effect. And if he was not deceived, but intended to give to the children of this unlawful union, then his gift will fail, as not expressed in terms such as to satisfy the requirements of the law in a case of that kind. It may also be observed that although Lord Justice *James* relied much on the recognition by the testator of these Respondents as his grandchildren, there is no allegation in the bill that such was the fact. The gift, too, is to the children of *Mary Crook*, but there was no

such person, for *Mary* was not the wife of *Crook*, and therefore the designation itself is improper.

It is said that in the construction of wills the intention of the testator is to be the guide; but, as explained by Lord *Wensleydale* in *Roddy* v. *Fitzgerald* (1), that intention must be gathered from the very words which he has used, and not from any conjectural presumption as to what he must have intended by the use of them—a declaration of the law which has been reiterated and affirmed in several decisions in this House: *Grey* v. *Pearson* (2); *Jenkins* v. *Hughes* (3).

Now as to the cases. *Wilkinson* v. *Adam* (4) was constantly referred to; but it is not decisive of this case, for there the testator could mean nothing but his own illegitimate children, children of the testator by *Ann Lewis*, whom he especially described as then living with him. To make the two cases parallel, the testator here should have said the children of my daughter by *William Crook*. But he has not said anything of the sort. *Cartwright* v. *Vawdrey* (5) established that illegitimate children were not entitled to share under a devise to children generally, notwithstanding that there were in the will strong indications that they were intended to be included in the devise. In *Godfrey* v. *Davis* (6) the illegitimate children were not, under a gift to "children," allowed to take, though the testator perfectly well knew, when he made his will, that there were illegitimate as well as legitimate children; and in *Swaine* v. *Kennerley* (7), where there was a similar gift, and there were two illegitimate children and one legitimate child, the whole went to the last, Lord *Eldon* expressly saying that the will itself must prove that illegitimate children were intended, and he added that "extrinsic evidence could be received only for the purpose of collecting who had acquired the reputation of being children of the person named in the will." These cases shewed that when one general expression alone was used, the two classes were not allowed to be mixed together, but one alone received the benefit of the gift.

(1) 6 H. L. C. 876.
(2) Ibid. 61.
(3) 8 H. L. C. 571.
(4) 1 V. & B. 422.
(5) 5 Ves. 530.
(6) 6 Ves. 43.
(7) 1 V. & B. 469.

1873
HILL
v.
CROOK.

It will be argued, that where the circumstances of the case raise a necessary implication, the two kinds of children may be included in one general devise; and *Wilkinson* v. *Adam* (1) will be cited in favour of that proposition, and a passage of Lord *Eldon's* judgment there (2) will be relied on, namely, that "in construing a will 'necessary implication' means, not natural necessity, but so strong a possibility of intention, that an intention contrary to that which is imputed to the testator cannot be supposed." But this sentence, difficult to understand in itself, is, if it has any meaning, in contradiction to what his Lordship had just before said, namely, that "conjecture must not be taken for implication," for what is a "possibility of intention"? clearly nothing but a matter of conjecture. The simple rule of law, of which this sentence is supposed to be a qualification, is preferable. In *Lord Woodhouselee* v. *Dalrymple* (3) no doubt a gift to "the children of *C. K.* living at my decease" was held to carry the property to certain illegitimate children recognised by *C. K.* as his children, but that was because there were not then, and *C. K.* being dead, there never could be, any legitimate children of that person. But where such a possibility exists, such a result cannot occur. There was such a possibility here. *Mary* might have married and have had legitimate children. *Fraser* v. *Pigott* (4), *Harris* v. *Lloyd* (5), *Bayley* v. *Snelham* (6), *Mortimer* v. *West* (7), *Bagley* v. *Mollard* (8), and *Gill* v. *Shelley* (9), all support the same principle of excluding illegitimate children where the devise is general to children, and two sorts of children in fact exist or may come into being; and that was most strongly exemplified in *Fraser* v. *Pigott* (4), where the words were to the "sons of *W.* and *J.*, whether born in wedlock or not," and where, though the illegitimate children of one of the sons took, he having no other, the illegitimate children of the other son, he having both legitimate and illegitimate children, were excluded. In *Meredith* v. *Farr* (10) there was a bequest of one half of a sum of money to the children of *A.* and the

(1) 1 V. & B. 422.
(2) Ibid. 466; see *Parker* v. *Tootal*, 11 H. L. C. 143.
(3) 2 Mer. 419.
(4) 1 You. 354.
(5) T. & R. 310.
(6) 1 Si. & St. 78.
(7) 3 Russ. 370.
(8) 1 Russ. & My. 581.
(9) 2 Russ. & My. 336.
(10) 2 Y. & C. Ch. 525.

other half to the children of *B.*, the latter being specifically named. Both *A.* and *B.* had legitimate and illegitimate children; it was held that only the legitimate children of *A.* could take, but all the children of *B.*, legitimate and illegitimate, were entitled, because the latter were named in the will. So in *Durrant* v. *Friend* (1) a bequest of income to the testator's daughter and her son till her son should be twenty-one, then to divide the principal into two parts, and to pay half to each, the son, being illegitimate, though the testator had known him to be so, was held not to be entitled. [LORD CHELMSFORD:—Here the children are described as the children of the testator's daughter *Mary*, who is called the wife of *John Crook*. Had they not, therefore, acquired that title by reputation?] That makes no difference. The question of acquiring title by reputation is one of evidence. In construing such a bequest, the Court cannot go out of the will itself in order to see and correct possible ambiguities in it. In *Davenport's Trusts* (2) the gift was to the children of a woman believed by the testator to be his nephew's wife, and so described by him, but she not being so the gift failed. And in *Dover* v. *Alexander* (3), even a power of appointment reserved by a woman in favour of an after-born child, was held incapable of being exercised by her for the benefit of an after-born illegitimate son. So in *Overhill's Trusts* (4), it was held that where there is a gift to children as a class it will attach to legitimate children only, unless the words plainly and undoubtedly include illegitimate children. And in *Worts* v. *Cubitt* (5), a natural daughter was only included in a general description of "all my daughters," because she had been specifically mentioned by her christian name, and so described as one of the daughters in a previous part of the will. And *Pratt* v. *Mathew* (6) settled that a gift by a man to his future illegitimate children cannot take effect, nor can illegitimate children take as a class unless it is clear that there are not any legitimate children to take. And in *Mason* v. *Bateson* (7), though the bequest was clearly designed for the benefit of illegitimate children, yet as there was an insuffi-

(1) 5 De G. & Sm. 343.
(2) 1 Sm. & Giff. 126.
(3) 2 Hare, 275.
(4) 1 Sm. & Giff. 362.
(5) 19 Beav. 421.
(6) 22 Beav. 328.
(7) 26 Beav. 404.

1873
HILL
v.
CROOK.

cient description of them it was held that they were not entitled. A doubt expressed in *Pratt* v. *Mathew* (1) was, in *Howarth* v. *Mills* (2), decided, namely, that a bequest to the future illegitimate children of a woman could not take effect. In *Barnett* v. *Tugwell* (3) the legatees were expressly described as illegitimate, and they did not take as a class, but only as persons designated. There, as here, a woman who had gone through the ceremony of marriage with the former husband of her sister, made a bequest in favour of her children, "legitimate or otherwise," and it was held that the children born after the date of the will were excluded from its benefit. The same rule was applied in *In re Standley's Estate* (4), where the illegitimate children of the testator (and he had no other) were duly designated in one part of the will, and in another part the contingency of one or more of them dying was provided against by a gift to their "next of kin." It was held that this would not pass any interest to such children, but that the property must be divided between the widow and the Crown. The Vice-Chancellor's observations shewed of how little avail were the testator's efforts by general words to cause his illegitimate to be treated like his legitimate children. So in *In re Wells' Estate* (5) a gift plainly intended to benefit an illegitimate daughter as one of the testator's "children" was not allowed to take effect. *Clifton* v. *Goodbun* (6) did not shake but confirmed the rule laid down in the other cases, for there the testatrix, an unmarried woman, leaving her property to her children, expressly named them, and they took as *personæ designatæ*. Nor is *Holt* v. *Sindrey* (7) an authority against the Appellants, for there every circumstance, except the fact of a previous and secret marriage unknown to the testator and never consummated, was in favour of the children of the first legatee; but even in that case it was distinctly declared by the Court that the natural and proper meaning of the word "children" was legitimate children, and the Court only decided in favour of the illegitimate children, because there were no others in existence, and everything both on the face of the will and in the conduct of the

(1) 22 Beav. 328.
(2) Law Rep. 2 Eq. 389.
(3) 31 Beav. 232.
(4) Law Rep. 5 Eq. 303, 310.
(5) Law Rep. 6 Eq. 599.
(6) Ibid. 278.
(7) Law Rep. 7 Eq. 170.

parties had shewn that the claimants there were the persons really intended. In *Lepine* v. *Bean* (1), equally strong circumstances existed, and gave rise to the decision. So that, in truth, these cases do not at all trench on the established rule, but acknowledge it, and are decided on grounds independent of it.

In order to let in evidence, (which had been admitted in some of these cases) there must be something ambiguous on the face of the will; but where that ambiguity does not exist, and it is submitted that it does not exist here, evidence is not required and ought not to be admitted. The result of all the cases is that when a testator uses the word "children," he must be taken to mean legitimate children; and evidence cannot be admitted to prove that he might have meant to include in the word illegitimate children. If he had put into the will the word "legitimate," which would but have been expressing what the law implies, there could be no doubt upon the matter. Nor ought there to be any, though that word is not expressly written. If the argument is used here that this testator believed the union to be a marriage and the children to be legitimate, then it is clear that his idea being wholly erroneous, his intention cannot be fulfilled, and the children whom he believed to be legitimate, and to whom, as such, he gave his property, not being so, they are not the persons he intended, and they cannot take.

Mr. *Dickinson*, Q.C., and Mr. *F. Hoare Colt*, for the Respondents:—

There is no doubt about the cases and their authority. The only possible doubt is as to the application of them. The real question is, whether these children are not here so thoroughly designated and pointed out that their individuality is declared and settled by the will itself. If they are so designated, they will take under the will, for all that is required is that the testator's intention shall be plain. A description by a mere reference to paternity of course is not sufficient. So, no doubt, there must be something to shew that at the time of making the will the testator had the particular persons in his mind, and used words sufficient to identify them. The Court must put itself in the position of

(1) Law Rep. 10 Eq. 160.

1873
HILL
v.
CROOK.

the testator, and by the words of the will decide what he meant. To assist it in making this decision, it may receive evidence of his acts with reference to the family. If the words and the evidence point to children that were, and were known, and known by him, to be illegitimate in the strict sense of that phrase, and yet his intention was clearly manifested to provide for them, they will take, although the word "children" alone is used. If the children have acquired by reputation the title of children of the particular person named, they certainly take. If the word "children" alone is used, and there are no circumstances to shew that illegitimate children were meant, or were included in the gift, then undoubtedly they could take no benefit. But where such circumstances do exist the Court will consider them and give due effect to them. Many of the cases already cited, to which that of *Hart* v. *Durand* (1) may be added, are admitted to establish that doctrine; but they do not establish that there must be an absolute designation of the individual children, or that if there is not such a designation there can be no evidence admitted to shew what was the knowledge, and what, under the circumstances, was and must have been the intention of the testator. Where there is a case to let in extrinsic evidence, and that evidence taken with the will clearly points to illegitimate children, they will take. *Wilkinson* v. *Adam* (2) fully establishes that doctrine, and the same principle is to be deduced from *Beachcroft* v. *Beachcroft* (3), *Gordon* v. *Gordon* (4), *Fraser* v. *Pigott* (5), *Gill* v. *Shelley* (6), *Savage* v. *Robertson* (7), *Lepine* v. *Bean* (8), and, in fact, all the cases that have been decided on the subject. *Primâ facie*, no doubt, "children" means legitimate children, but the word may be shewn by the will and by evidence to include others.

Where the intention is thus clearly established, illegitimate as well as legitimate children may take, and take as a class, and some of the cases before cited, especially that of *Wilkinson* v. *Adam* (2), establish that proposition, which is also warranted by

(1) 3 Anstr. 684.
(2) 1 Ves. & B. 422.
(3) 1 Madd. 430.
(4) 1 Mer. 141.
(5) 1 You. 354.
(6) 2 Russ. & My. 336.
(7) Law Rep. 7 Eq. 176.
(8) Law Rep. 10 Eq. 160.

Evans v. *Davies* (1); *Meredith* v. *Farr* (2); *Barnett* v. *Tugwell* (3); and *Owen* v. *Bryant* (4).

The description here on the face of the will is complete. It is said that there is no importance to be attached to the words "son-in-law," because *Crook* had married the eldest daughter of the testator, and so was properly described by those words. But then there were the words "present husband," which could not apply to any one but *Crook* and to the relation then existing between him and the testator's daughter *Mary*, and shewed that the other words were also meant to apply to him and to her, and to describe them and their children. On these matters there can be no doubt about what was the intention of the testator, that intention being sufficiently expressed on the face of the will itself. But even with regard to a deed if there is any ambiguity evidence may be admitted to explain it. That is so: *The Attorney-General* v. *Drummond* (5); and as to wills evidence of that kind has been constantly admitted: *Grant* v. *Grant* (6).

The only difficulty in point of law really appears to be this, whether the Respondents, though sufficiently described to be enabled to take, can take as a class, when by possibility there may be legitimate children. It is clear that if the gift was in words "to children, whether legitimate or illegitimate," all would take: *Wilkinson* v. *Adam* (7), shews that there is no rule prohibiting the two classes from taking together. Then what can be the difference when the will says "children," and from its context and the properly admitted evidence in the cause, the intention of the testator is shewn to be the same. Again, the testator treated the Respondents as his grandchildren, they could only be so as the children of his daughter. In *Cartwright* v. *Vawdrey* (8) the expression used was not held sufficient to shew clearly what was the intention of the testator, and therefore the bequest failed. Had that intention been clear it would have taken effect.

(1) 7 Hare, 498; 18 L. J. (Ch.) 180.
(2) 2 Y. & C. Ch. 525.
(3) 31 Beav. 232.
(4) 2 De G. M. & G. 697.
(5) 1 D. & War. 353.
(6) Law Rep. 5 C. P. 380; see *In re Ingle's Trusts*, Law Rep. 11 Eq. 578; and *Sherratt* v. *Mountford*, Law Rep. 15 Eq. 305.
(7) 1 Ves. & B. 466.
(8) 5 Ves. 530.

1873
HILL
v.
CROOK.

The testator here was not deceived, nor has his intention failed. He did not call *Mary* the wife of *Crook*, nor did he call *Crook* her husband under any mistake of fact, he knew all the facts, and he insisted on treating the union as a marriage and the children as the legitimate children of the marriage. He was wrong, in point of law, as to the legal character of the union of these two persons; but there is nothing to impeach his designation of the children as the objects of his bounty. There never could be any doubt as to the persons to whom he intended his property should go. Here the intention was to provide for individuals whom the testator knew, and whom he indicated by a name which, though erroneously given them, in point of law, was that by which he had always thought fit to recognise them, and which clearly pointed them out to the knowledge of all the rest of the world as the "children" whom he intended to benefit.

The *Solicitor-General*, in reply, insisted on the application of the general principle, and referred to *Warner* v. *Warner* (1).

LORD CHELMSFORD:—

My Lords, the question in this case is not, as the Solicitor-General stated upon the opening of the appeal, what amount of intention must be expressed in order to allow illegitimate children to take under a will, but whether there is a sufficient indication in the will in question of an intention that the children of *Mary Crook*, the daughter of the testator (who by law were illegitimate), should take under the description of "all and every the children or child of my daughter *Mary Crook*."

To lay down such an abstract rule as suggested would be impossible, for each case must be decided according to the varying indications of intention which are to be found in each particular will. There are certain general rules which are applicable to the construction of all wills of this description, one of which is that a gift to "children" *primâ facie* imports legitimate children. And this construction will not yield to mere conjecture, or to anything short of the clearest evidence of an opposite intention. As Lord *Eldon* said in *Wilkinson* v. *Adam* (2): "In construing a will, con-

(1) 20 L. J. (Ch.) 273. (2) 1 V. & B. 466.

jecture must not be taken for implication, but necessary implication means, not natural necessity, but so strong a probability of intention that an intention contrary to that which is imputed to the testator cannot be supposed." Strong observations were made upon the words "natural necessity," which were said to be unintelligible. They are, perhaps, not happily chosen, but I understand them to mean that the intention need not be expressed in language which is necessarily susceptible of only one interpretation, but that it is sufficient if it is indicated in a way that excludes the probability of an opposite intention having existed in the mind of the testator. In construing a will, it has been frequently said that the Court should place itself as fully as possible in the situation of the testator, and guide its construction of his intention in some degree by the light of the knowledge thus acquired.

The testator, *John Hill*, knew that *John Crook*, whom he calls his "son-in-law," had first married his daughter *Sarah Ann*, and that upon her death *Crook* had gone through the ceremony of marriage with his other daughter *Mary*. It was said in argument that there is no statement in the bill that the testator knew of the first marriage; but I think this knowledge may be assumed in the absence of any allegation to the contrary. Whether the testator knew that the second marriage of *John Crook* with his daughter *Mary* was void or not does not appear, but ignorance upon this point can hardly be imputed to him. It is stated that he always looked upon it as an existing marriage, which is ambiguous. But it is admitted that the testator always treated *John Crook* as his son-in-law, and always treated the Respondents, who were born after this union, as his grandchildren. *Mary Crook* had therefore acquired by reputation the name of wife of *John Crook*, and the Respondents had acquired by reputation the name and description of children of *Mary Crook*.

In the beginning of the will the testator styles *John Crook* his son-in-law. It was said in argument that this is of no importance, as he had actually been his son-in-law by his marriage with the testator's daughter *Sarah Ann*. But that the testator meant at the time of making the will to speak of him as being his son-in-law plainly appears from his afterwards calling his daughter "my daughter *Mary* the wife of *John Crook*."

1873
HILL
v.
CROOK.

The devise to *Mary Crook* and her children is in the following terms:—[His Lordship read it, see *ante*, p. 266.]

Looking to the facts which must have been in the mind of the testator at the time of making his will, is there or is there not a plain declaration, or a manifest intent, that the two existing children of *Mary Crook* should take under the description of her children? If he so intended, then, whether they were legitimate or illegitimate appears to be immaterial; for, as Lord *Eldon* said in *Wilkinson* v. *Adam* (1), "There is no law against devising to the children of a woman whether natural or not, as that creates no uncertainty."

But it was said the gift is to all the children of *Mary Crook* as a class, which renders it by law inapplicable to illegitimate children. The proposition stated in this general and unqualified way is inaccurate. There may be a gift to existing illegitimate children as a class, provided it clearly appears that they were intended to be the objects of the gift. No gift, however express, to unborn illegitimate children is allowed by law, nor under a gift good as to illegitimate children as a class will after-born illegitimate children be permitted to take. But I know of no objection in law to a gift to children with a clear intention that it shall apply to existing illegitimate children, being so applied, although after-born illegitimate children must be excluded and the gift be extended to future legitimate children.

The Solicitor-General argued that a gift by will to the children of *A. B.* can by law apply only to his lawful children living at his death. I asked whether this rule was so inflexible as not to bend to the plainest indications of an opposite intention; to which question there could be only one answer. In the course of his argument he put his case thus:—The testator intended his words to have their proper meaning, but their application legally was to different persons. If I interpret this argument correctly it means this: The testator intended by the gift to the children of *Mary Crook* to benefit her children, but they being illegitimate the law lays hold of the expression of "children" and diverts it from its intended meaning, because it will not allow a gift to children as a class to apply to any other than legitimate children. But there is an

(1) 1 V. & B. 466.

1873
HILL
v.
CROOK.

obvious fallacy in this argument. If a devise or bequest is made to children as a class, and there is nothing to indicate a contrary intention, the law undoubtedly appropriates the gift to lawful children only; but if a different intention is manifest (and in stating the proposition a different intention is assumed) illegitimate children will be allowed to take as a class.

It was farther argued that whether the testator believed the marriage of *John Crook* with his daughter *Mary* to be a lawful marriage or not, the devise would be equally invalid. That if he thought *Mary's* children were legitimate he meant to benefit them as legitimate children, and therefore he was deceived in his gift and his devise failed as being contrary to his intention; and if he thought the children were illegitimate his gift failed for want of a sufficient description of them in that character. But this dilemma may be easily disposed of. If it clearly appears that the testator intended to benefit the existing children of *Mary Crook*, and has manifested his intention by a description which has an application to them in the first instance, it is immaterial whether they are legitimate or illegitimate, for there can be no mistake as to the persons intended; and illegitimate children may take under a gift to children if described with sufficient certainty.

Mr. *Jarman*, in his Treatise on Wills (1), in the conclusion which he draws from the cases on this subject, says that "illegitimate children may take by any name or description which they have acquired by reputation at the time of the making of the will." There can be no doubt that the Respondents were reputed and known as the children of *Mary Crook*, and they appear to me to be as clearly pointed to by that description as *personæ designatæ* as if they had been mentioned by name. I think, therefore, that the devise to the children of *Mary Crook* as a class applies to the Respondents though illegitimate, not by necessary implication but by actual description, notwithstanding that future illegitimate children are excluded from the gift, and that the class includes future lawful children of *Mary Crook* by any after-taken husband.

I am of opinion that the decree of the Lords Justices ought to be affirmed. I believe, my Lords, it was understood between the parties that the costs were to come out of the estate.

(1) Vol. ii. c. xxxi.

1873

HILL v. CROOK.

LORD COLONSAY:—

My Lords, two things are clear, and do not depend in any degree on the intentions of the testator or the terms of his will, viz., first, that the union of *Mary Hill* and *John Crook*, though in form a marriage was, by law, not a valid marriage, and that the children born of that union were not legitimate children; secondly, that the testator could not by any form of words make an effectual bequest in favour of after-born children of that union, or create a trust for the benefit of such after-born children, and, consequently, that no such children can take under the will in question.

There are also certain rules of construction, as to which there does not appear to be any material difference of opinion, viz., first, that the term "children" in itself means only children lawfully born, and must be so understood, unless there is in the will something sufficient to shew the contrary; secondly, that illegitimate children existing at the date of the will may take under the term "children" if they are sufficiently indicated. It was said that in that case they would not take as a *class*, but as persons specially designated, just as if they had been enumerated or severally named. I have no disposition to disturb the legal susceptibilities attached to the word "class," but, without doing so, I may be permitted to say that I think such children may take though described *collectively*. That, I venture to think, is not inconsistent with the authorities. There was another proposition maintained by the Appellants, but which was not assented to by the Respondents, viz., that legitimate and illegitimate children cannot take together under what was sometimes called the same "description," sometimes the same "class."

The question we have to decide is, whether the testator has sufficiently indicated his purpose that the children of the union of his daughter *Mary* and *John Crook* were to take under the trust created by his will. I am of opinion that he has. He begins by describing *John Crook* as "his son-in-law." He describes his daughter *Mary* as the "wife of *John Crook*." He constantly calls her "*Mary Crook*," a name clearly referable to her union with *Crook*. He directs that the rents during her life should be for her own use and benefit, "independently of her present or any after-taken husband," plainly contemplating two possible conditions in

1873
HILL
v.
CROOK.

her future life, both of which he puts on the same footing. Then he declares that "from and after the decease of my said daughter *Mary Crook*" the property shall remain on trust for the benefit of all and every the children of "my said daughter *Mary Crook*," on such conditions as his said daughter "*Mary Crook*" shall appoint, and in default of such appointment he gives directions as to the distribution among the children of his daughter "*Mary Crook*." And, finally, if in dealing with this case we are to accept the statement in the bill, he not only knew that there were children of the union with *Crook*, but he always treated the young *Crooks* as his grandchildren, which they undoubtedly were. Now looking to the structure of that part of his will which contains the bequests to his daughter and her children, and seeing plainly the current of thought and intention by which he was actuated, it is clear to me that in regard to the distribution of his estate, which was the real purpose of his will, he intended that these children should participate and be dealt with as if they were legitimate, giving to them in the distribution all the benefit that could belong to legitimate children, and that his direction to his trustees cannot fairly be read in any other sense.

But in answer to this it is said that if *John Crook* had died, or if the mother of the children had separated from him and married some other person, and had had children by that other person, such children could have taken under the terms of the will, and that it is legally impossible that both legitimate and illegitimate children could take together under it. Therefore it is said you cannot impute to the testator an intention so repugnant to law as to include the children of his daughter by *Crook* though they were known to him and treated by him as his grandchildren. I do not think that any of the authorities cited went that length, although they were represented as of all shades of complexion and altogether irreconcilable, and we were asked to extract from them some valuable principle, or to find one for ourselves. Far from me be the presumption to undertake that task. But if I find in this case, as I think I do, sufficient to indicate or point out clearly the then existing children of the union of the testator's daughter *Mary* with *John Crook* as objects of his bequest, I should be unwilling, unless compelled by some very clear and absolute rule,

1873
HILL
v.
CROOK.

plainly applicable to the case, to hold that they must be excluded because the words are such as would comprehend the possible children of some possible future marriage.

I think that the judgment of the Lords Justices should be affirmed.

LORD CAIRNS:—

16 Ch D 648
24 Ch D 693
697.

My Lords, I have had an opportunity since the argument of this case concluded, and I have felt it my duty, to look with considerable care through the long line of cases, most of which were referred to in the argument at your Lordships' Bar, upon the subject of a will dealing with children who are said to be illegitimate. I have referred to those cases not with the view of finding a will exactly parallel with the present, for that, indeed, would be a hopeless task, but for the purpose of extracting any principle which appeared to be the *ratio decidendi* of those various cases. And what appears to me to be the principle which may fairly be extracted from the cases upon this subject is this—the term "children" in a will *primâ facie* means legitimate children, and if there is nothing more in the will, the circumstance that the person whose children are referred to has illegitimate children will not entitle those illegitimate children to take.

But there are two classes of cases in which that *primâ facie* interpretation is departed from. One class of cases is where it is impossible from the circumstances of the parties that any legitimate children could take under the bequest. A familiar example of that might be given in this way:—Suppose there is a bequest "to the children of my daughter *Jane*," *Jane* being dead, and having left illegitimate children, but having left no legitimate children. There, inasmuch as the testator must be taken to have known the state of his family, and must be taken to have intended to benefit some children of his daughter *Jane*, and inasmuch as she had no children who could be benefited except illegitimate children, rather than that the bequest should fail altogether the Courts will hold that those illegitimate children are intended, and they will take under the term "children." Having referred to that class of cases, I may put them altogether aside; for your Lordships will observe that that class of cases can have no bearing

1873
HILL
v.
CROOK.

upon the present case, because here, as was truly said, there was no reason why legitimate children might not take under the bequest in this will.

The other class of cases is of this kind. Where there is upon the face of the will itself, and upon a just and proper construction and interpretation of the words used in it, an expression of the intention of the testator to use the term "children" not merely according to its *primâ facie* meaning of legitimate children, but according to a meaning which will apply to, and which will include, illegitimate children. I might give again a familiar illustration of that class of cases by the supposition of a bequest upon which, I presume, there would be no argument. Suppose that a testator were to say in his will, "being aware that my daughter, who is now married to her husband, had before her marriage children by the same person, who in law are illegitimate children, and it being my intention to provide for all the children of my daughter, I give funds to trustees upon trust for her for life, and after her death to divide the funds among the children of my said daughter." I apprehend that no person reading a bequest of that kind could hesitate to say that the testator had shewn upon the face of his will, by the words which he had used, his intention, in a way that could not be mistaken, to use the generic term "children" so as to include illegitimate children along with legitimate children.

16 Ch D 64
652

My Lords, the question is, whether this case ranges itself amongst that latter class of cases to which I have referred, or not? In my opinion, it does.

In the first place, in order to interpret the words of the will, it is always not only allowable, but it is the duty of the Court to obtain, the knowledge which the testator had of the state of his family. I find this statement with regard to the state of the testator's family admitted by the demurrer to this bill: "*John Crook* had formerly been married to *Sarah Ann*, one of the daughters of the said testator, and the said *Sarah Ann* having died in the year 1851, the said *John Crook* in the year 1854, with the full knowledge of the said testator, went through the ceremony of marriage with the said *Mary*, another daughter of the said testator, and who is in his said will referred to as '*Mary* the wife of the

16 Ch D 65

1873
HILL
v.
CROOK.

said *John Crook*,' the said union of the said *John Crook* and *Mary Crook* was always looked upon by and treated by the said testator as an existing marriage. Two children of the said *Mary Crook* were born after her said marriage, and during the lifetime of the testator, that is to say, the Plaintiff, *Alice Sarah Crook*, who was born on the 4th day of November, 1854, and the Plaintiff *Ernest William Crook*, who was born on the 21st of July, 1858. The testator was in the habit of constant and affectionate intercourse with his said daughter *Mary Crook* and the said *John Crook*, and always recognised and treated the said *John Crook* as his son-in-law, and always recognised and treated the Plaintiffs as his grandchildren."

Now I may say that, in my opinion, if the matter had stopped there, if your Lordships had nothing more than this admitted statement of the state of the family and the habit of the testator with regard to the treatment of his grandchildren, that would, in my opinion, not have been sufficient. If, even with that statement, you found in the will merely a reference to the children of his daughter *Mary*, it would not, in my opinion, have been sufficient to refer to this statement of the fact with regard to the family, to entitle you to enlarge the term "children" so as to include illegitimate children. But when we turn to the terms of the will we find these expressions used. In the first place, the testator calls this *John Crook* his "son-in-law," and he makes it clear that he calls him his son-in-law, not in respect of his former marriage to his daughter *Sarah Ann*, but in respect of his union with *Mary*, because he describes her as the "wife of *John Crook*." Then he makes a provision for *Mary* the "wife of *John Crook*" in these words: that it is to be "for her sole, separate, and exclusive use and benefit, independently of her present or any after-taken husband, and without being liable to the debts, control, or engagements of any such husband." And then he directs, "after the decease of my said daughter *Mary Crook*," that the property is to be held "upon such trusts for the benefit of all and every, or such one or more exclusively of the other or others of the children or child of my said daughter *Mary Crook*," as she shall appoint.

My Lords, a great deal of criticism was passed upon the statement admitted by the demurrer with reference to the family of

1873
HILL
v.
CROOK.

the testator. It is quite sufficient, I think, to say that, in my opinion, that statement admitted by the demurrer amounts to this—that there was here, in the family of the testator, a case of what is commonly called a marriage with a deceased wife's sister. The testator knew that it was that kind of marriage. I think it must be assumed that he knew that that marriage was in law illegal, but he had brought himself—by what process of reasoning or feeling it is not for your Lordships to determine—to consider that, notwithstanding the law of the country, that was a union which he was justified in styling a "marriage," and that he was justified in styling the parties to that union or connection "husband and wife." It is not for your Lordships to criticise the feelings which led to these expressions. It is a question of fact that we are dealing with; and, as a matter of fact, this was the way in which the testator viewed and spoke of this connection.

It appears to me that the terms "husband" and "wife," "father" and "mother," and "children," are all correlative terms. If a father knows that his daughter has children by a connection which he calls a "marriage," with a man whom he calls her "husband," terming the daughter the "wife" of that husband, I am at a loss to understand the meaning of language if you are not to impute to that same person when he speaks of the "children" of his daughter this meaning, that as he has termed his daughter and the man with whom she was living "wife" and "husband," so also he means to term the offspring born of that so-called "marriage" the children according to that nomenclature. That is all that your Lordships have to find. If you find that that is the nomenclature used by the testator, taking his will as the dictionary from which you are to find the meaning of the terms he has used, that is all which the law, as I understand the cases, requires. Treating the cases as establishing the proposition to which I have referred, I am of opinion that there is clearly upon the face of this will, reading it simply with the knowledge which we are told to impute to the testator, a statement by him in his own words that he meant to make a provision for the family already born of that union which he styles a "marriage."

My Lords, I do not go over what has been said by my noble and learned friend now sitting upon the woolsack (Lord *Chelmsford*)

1873
HILL
v.
CROOK.

as to the impossibility of providing for future illegitimate children; that is out of the question here. The question here is, whether these children who have filed this bill, and who were born before this will was made, can take under this will; and in my opinion they can.

Order appealed from affirmed, and appeal dismissed.

Lords' Journals, 27th May, 1873.

Solicitors for the Appellants: *Wilkins, Blyth, & Marsland.*
Solicitors for Respondent: *Turner & Son.*

1873
May 8, 9, 27.

THOMAS MATTHIAS WEGUELIN AND OTHERS, TRADING AS THOMSON, BONAR, & CO. . . . . } APPELLANTS;

AND

EUGENE CELLIER AND JOHN PETER PARRAU . . . . . } RESPONDENTS.

Consignees—Freight on Shipowner's own Goods—Set-off.

2 C.P.D. 165.
2 App. Cas. 741

A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the said goods £4 5s. per ton of 20 cwt. net, delivered, with primage and average accustomed," &c.:—

Held, that the two forms of expression were in effect the same, and constituted the ordinary condition that the goods were to be deliverable only on paying freight.

Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order.

T. & Co., who acted as the *London* bankers for *Holm* of *Stockholm*, consented to open a credit in his favour with merchants at *Akyab* for the purchase of "rice for the English market shipped by vessels of my own, the *Java*, &c. at, &c., *f. o. b.*" The rice was purchased, and shipped on board the *Java*, and made deliverable to the order of *T. & Co.*, who accepted bills to cover the purchase. The bill of lading was indorsed to them; it described the goods "to be delivered in like good order, &c., unto *T. & Co.*, or their assigns;

freight for the said goods £4 5*s.* per ton of 20 cwt. net, delivered with primage and average accustomed." While the *Java* was on its voyage, *Holm* obtained advances from *C. & Co.*, to whom he assigned the freight as security:—

Held, that under these circumstances *C. & Co.* were entitled to the freight, and that *T. & Co.* were, like all other consignees of a cargo, liable to pay it under the terms of the bill of lading, although the cargo was in fact brought to *England* in *Holm's* own vessel the *Java*.

The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods, who was also the assignor of the freight.

THIS was an appeal against a decision of Lord Chancellor *Cairns* which had reversed a previous decision of the Master of the Rolls.

Messrs. *Thomson, Bonar, & Co.* were the *London* bankers of Mr. *Holm*, a Swedish merchant. On the 26th of December, 1863, he wrote to them a letter in which he said, "I beg to lodge a credit with you in favour of Messrs. *Halliday, Bullock, & Co.*, of *Akyab*, for purchase and shipment of about 1300 tons of rice, of such kinds and qualities as are most suitable for the English markets, to be shipped by vessels of my own, the *Java* and the *Augusta*, at the price of about 4*s.* 6*d.* per cwt., f. o. b., but with liberty to pay up to 5*s.* sterling per cwt., f. o. b., in case the above friends find it to be to my interest to pay such a price. Please confirm this credit, by first mail, for my account, to be availed of in drafts at the usual sight against shipping documents and timely orders for effecting the insurance. The *Java* will be ready to leave your port direct for *Akyab* in ballast in the course of next month."

Thomson & Bonar, on the 11th of January, 1864, by a letter to *Halliday & Bullock*, confirmed the proposed credit in the terms of the proposal itself. In their letter they said, "We beg to advise you that your drafts upon us at six months against shipping documents to the extent of £6500 will meet with due honour on presentation. We beg to add that it is understood that timely notice is to be given us for insurance, and that bills of lading are to be made out to *Thomson, Bonar, & Co.*"

On the 9th of July, 1864, *Halliday & Bullock* wrote to *Thomson & Bonar* advising drafts upon this credit to the amount of £4450; and "as cover for the above we beg to hand you bill of lading for 847 tons rice, per *Java*, made out to your order, and

1873

WEGUELIN v. CELLIER.

with ship's disbursements indorsed thereon." The bill of lading for the *Java* was in these terms: "Shipped in good order, &c., by *Halliday, Bullock, & Co.*, in and upon the good ship called the *Java*, whereof is master for this present voyage *Zellinger*, and now riding at anchor in *Akyab* harbour, and bound for *Cork* or *Falmouth* for orders, 8410 bags of new *Nacrenzi* cargo rice, and 3165 bags of new *Byac* cargo rice, weighing in all 847 tons net, being marked and numbered as in the margin, and are to be delivered in like good order and condition unto Messrs. *Thomson, Bonar, & Co.*, or to their assigns; freight for the said goods £4 5*s.* per ton of 20 cwt. net delivered, with primage and average accustomed," &c. The bill of lading was signed "*P. Zellinger.*" The indorsement on it was in these terms: "Received from *Halliday, Bullock, & Co., Akyab*, the sum of £250 sterling, being amount of my ship's disbursements at *Akyab*, the amount to be deducted from the freight on this bill of lading on settlement thereof.

"£250 sterling. "*P. Zellinger.*"

"*Akyab*, 9th July, 1864."

On the day on which this letter was received the bills therein mentioned were presented to *Thomson, Bonar, & Co.*, and accepted by them, and these bills when at maturity were duly honoured.

On the 20th of August, 1864, *Thomson & Bonar* wrote to *Holm* a letter, in which they said, "We have received your favour of the 12th instant, and have duly passed to your credit your remittance of £1700, and have honoured Mr. *Carl Nylen's* draft for the same amount to your debit.

"We beg to refer you to our respects of the 5th, 8th, and 15th instants, relating to the insurance per *Java* to be covered by you, neither of which have you acknowledged.

"We now annex you copies of two letters received to-day from Messrs. *Halliday, Bullock, & Co.*, of *Akyab*, who have drawn on us for the cost of the cargo per *Java* £4450 against the bills of lading of 11,575 bags of rice weighing 847 tons.

"The bills of lading are made out for *Cork* or *Falmouth* for orders, and the cargo is deliverable to our order.

"We are anxious to know what sum you have insured upon the cargo, and beg that you will advise us by return of post, if your advice on this head be not already on the way."

On the 22nd of August, *Holm* wrote a letter acknowledging the receipt of several communications from *Thomson & Bonar*, and among them those above mentioned. He also told them that he had effected insurances at a very moderate premium; "and after having closed the policies, I will give you the exact valuation, crediting you the usual commission. The insurance is effected (F. P. A.), knowing my vessel to be good and strong, and commanded by a clever captain. The policies I hold for you, and are at your disposal. I hope it will not take long till you get the samples of the cargo, as well as the shipping document, and as it will take a good time before the arrival of the vessel, I trust the prices will have advanced, leaving a margin which may be termed a good freight."

On the 8th of November, 1864, *Holm* wrote to *Cellier & Parrau* of *Hamburgh* a letter, in which he said: "As per agreement with your Mr. *Parrau*, I have to-day drawn upon you B. co. 45,000 at two months' date, which please protect; and on the other hand, I hereby as security place at your disposal the freights *Java* and *Frederik*. The *Java*, Captain *P. Zellinger*, with 845 tons rice, sailed on the 11th of August from *Akyab*, and *Frederik*, Captain *J. T. Hultman*, with 590 tons rice, on the 1st of September from *Penang*. Both vessels may be expected next month, and I shall, if you wish it, immediately send you letters to the captains, ordering them to hold the necessary amount at your disposal. The ship *Java* may be expected the beginning of the month."

The Respondents accepted the two bills thus drawn, and paid them. *Holm*, on the 18th of November, 1864, sent to the masters of the two vessels notices, both of which, with the difference of the names of the ships and the masters, were in the same terms, namely, "I hereby request that you will, for my account, hold the entire freight at the disposition of Messrs. *Cellier & Parrau*, of *Hamburgh*, or else allow said gentleman to collect the freight in case they so wish."

On the 22nd of December, 1864, *Holm* suspended payment, and was made a bankrupt, and assignees were appointed according to the forms of the Swedish law.

On the 9th of January, 1865, the *Java* arrived in *London*, and entered the *St. Katharine's Docks*, and on the same day the

1873
WEGUELIN
v.
CELLIER.

Respondents gave to the dock company the usual notice of stopping for freight.

On the same 9th of January, 1865, the Respondents received from the master of the *Java* an order addressed to *Thomson & Bonar*, in these words: "Please pay Messrs. *Cellier & Parrau*, of *Hamburg*, or order, the amount of freight on cargo of rice ex my vessel *Java* from *Akyab*." On the same day Mr. *Parrau*, for the Respondents, served the following notice on *Thomson & Bonar*: "Gentlemen,—I beg to give you notice, that my firm *Cellier & Parrau*, of *Hamburg*, hold authority from Mr. *John Holm*, of *Stockholm*, per date 18th of November last, to encash the freight on cargo of rice ex *Java* at *Akyab*. I hold also captain's order upon you for same, and the cargo is stopped, for freight, with the dock company, subject to release of my firm. *J. P. Parrau*." After some correspondence the Appellants deposited a sum of money with the dock company, and obtained the delivery of the cargo to the buyers.

In February, 1865, Messrs. *Cellier & Parrau* filed their bill against *Thomson & Bonar*, praying that it might be declared that they had a valid charge on the freight for the amount due to them in respect of the bills of exchange accepted and paid by them in virtue of *Holm's* letter of the 8th of November, 1864. The Appellants by their answer set up a claim that the cargo of the *Java*, as well as the vessel itself, belonged to *John Holm*, and that consequently there was no freight payable on the said cargo, and that the entry as to the freight on the bill of lading was a mere matter of form.

It appeared in evidence that the statement as to the freight was inserted in the bill of lading, not specially with regard to this particular cargo, but in pursuance of express general instructions to that effect given by *Holm* to the masters of all his ships.

The cause was heard before the Master of the Rolls, who on the 5th of December, 1867, made a decree dismissing the bill with costs. On appeal to the Lord Chancellor this decree was, on the 22nd of July, 1868, reversed. This appeal was then brought.

The *Solicitor-General* (Sir *G. Jessel*) and Mr. *Charles Hall*, for the Appellants:—

The mere mention of "freight" in a bill of lading cannot make

freight payable. Here the payment of freight is not, as in ordinary bills of lading, made a condition of the delivery of the goods. Besides, here the shipper's own goods were put on board the shipper's own vessel, and it would be absurd to suppose that he made the goods liable to freight to be paid by himself to himself. The possibility of such a thing is answered by his own declaration that they were "f. o. b." To make his pledgee pay freight on them would be like making a pawnbroker pay the cost of bringing to him goods which were to be pawned. Here the goods were pledged to the Appellants, they could not be liable to pay freight to *Holm*, the man who pledged them, and if the Appellants were required to pay on his account freight to a third person that would only have been a fresh advance by them to *Holm*, requiring a fresh security on the thing pledged. The ordinary words of a bill of lading, "he or they paying freight," constitute a bargain, the consignee on claiming the goods under the bill of lading adopts the bargain and undertakes to defray the freight. Those words were expressly excluded from this bill of lading. [LORD CHELMSFORD:—Would the master have been justified on this bill of lading in delivering up the goods without the payment of freight?] Certainly, if the master knew that they were the goods of the owner of the ship. In this instance he was not only liable, but compellable to give them up: *Machlachlan* on Shipping (1), quoting *Domett* v. *Beckford* (2). The ordinary words as to freight are only introduced into a bill o lading for the benefit and protection of the master as against a stranger: *Shepard* v. *De Bernales* (3). Here the master was the mere servant of the owner, and could not require them, and did not need them. No freight could be payable by the owner of the vessel on his own goods carried in his own ship. Here, too, the owner who pledged his goods undertook to send them in his own vessel, which, of course, amounted to an undertaking that they should be sent free of charge. For any charges for sending the goods, even if payable to a third person, *Holm*, the pledgor, would be liable—those charges could not be cast on the pledgee. The word "freight" is of equivocal meaning; it does not always mean the money chargeable for the carriage of the cargo, and in the letter of *Holm*, of the 22nd of August,

(1) 1st Ed. p. 426. (2) 5 B. & Ad. 521.
(3) 13 East, 565.

1873
WEGUELIN
v.
CELLIER.

it is clear that it meant the value of the cargo itself. He says: "I trust the prices will have advanced, leaving a margin which may be termed a good freight." The right of property in the goods remained in *Holm*. He had the possession and the right of sale. [LORD CHELMSFORD:—Subject to the right of the consignor to stop *in transitu*.] As to all the world, but the consignors, he was the owner of the goods. In *Gumm* v. *Tyrie* (1) the question was, whether if the bill of lading stated the cargo to be shipped on account of the owners of the ship, and it turned out that the cargo was not their property, any claim for freight could arise either at Law or in Equity, and Lord Chief Justice *Cockburn* there said (2): "Where goods are shipped on account of the owner of a vessel no question about freight can arise; and a mortgagee, if he takes possession, cannot claim freight in respect of the cargo conveyed in that vessel on account of the owner." *Thomson & Bonar* were here the mortgagees of the cargo, and stood precisely in the position of *Holm*, the owner of it, who had mortgageed it to them. Then, as he could not be liable to himself for freight on his own cargo, neither could they. The only result of holding the pledgee here liable to pay freight to the pledgor would be that the former would have a right to recover it back from the latter. If the pledgee paid freight it would only be a fresh advance on his part, which he would be entitled to claim direct as against the pledgor, or to set off as against any one else who claimed under him.

Mr. *Butt*, Q.C., and Mr. *Horace Davey*, for the Respondents:—

There was no contract here that the goods should be delivered to *Thomson & Bonar* free of freight, and the letters shew that they never expected it to be so. Freight is, in fact, a necessary incident to the carriage of goods by a ship: *Christy* v. *Row* (3). The contest here is upon the letters of the 26th of December, 1863, and of the 11th of January, 1864, which latter, addressed to *Halliday, Bullock, & Co.*, almost repeats the words of the former, and declares acceptance of the contract as there stated.

It is said that there could not be freight payable here because the owner of the goods was the owner of the ship, and that a man

(1) 4 B. & S. 680; affirmed 6 B. & S. 298.
(2) 4 B. & S. 703.
(3) 1 Taunt. 306.

cannot legally make a contract with himself, to pay freight to himself for his own goods carried in his own ship. But that does not truly represent the condition of the parties. *Halliday & Bullock* are spoken of as only his agents. That was not so. They acted upon his instructions in buying the rice, but they were the purchasers of it from third parties—were liable for it, and could have stopped it *in transitu*. As between *Holm* and themselves, they were the vendors of the rice, and were possessed of all the rights of vendors: *Feise* v. *Wray* (1). There the correspondent abroad buying goods on the orders of a person at home was held to possess full dominion over the property until his claims in respect of the purchase were satisfied. On the other hand, the Appellants were merely the bankers in *London* of *Holm*, and promised to honour his drafts on the bill of lading of the rice being made in their favour. That was done, and they were entitled to the cargo, but only on the condition of complying with the bill of lading. They, therefore, had distinct rights, and were under distinct liabilities: *Haille* v. *Smith* (2). It was a condition of the bill of lading that freight was to be paid for the rice. The rice was to be "deliverable to our orders," but only on the terms contained in the bill of lading. The very amounts mentioned in their letters shew that all the parties understood this to be so. The drafts on *Thomson & Bonar* amounted to £4450. There were against that 840 tons of rice at 5*s*. per cwt. At £5 per ton that would amount to £4200, and the added £250—a sum paid to the master in the first instance—exactly made up the full amount, and was really included in the freight. The letter of the 20th of August, 1864, shews this. There had been other transactions between the same parties, all of this same character, and what they had done before in other matters they did again in this. There is nothing in any of the letters to shew that the Appellants were to have the cargo freight free, and in the letter already referred to, though the cargo is expressly mentioned as to be "deliverable to our order," not one word is said about its being free from freight. It is true that in the letter of the 22nd of August, 1864, the word "freight" appears to be used ambiguously in one particular sentence. But that ambiguous use of one word cannot control the sense of all the

(1) 3 East, 93. (2) 1 B. & P. 563.

1873
WEGUELIN
v.
CELLIER.

other documents and of the meaning which is generally attached to the word "freight" itself, and is certainly attached to it in the bill of lading in this case. *Halliday & Bullock* were *primâ facie* the shippers of the rice, and of course were *primâ facie* liable for the freight; but *Thomson & Bonar* were made the consignees of the rice, and, under the 18 & 19 Vict. c. 111, s. 1, became subject to all the rights and liabilities of consignees. If the bill of lading passed the property in the rice, it passed also all the liabilities attached to that property: *Smurthwaite* v. *Wilkins* (1). And here the document itself required payment of the freight. The absence of the usual form of words, "he or they paying freight," could not affect the liability to pay it: the freight was expressly mentioned, and mentioned in the usual manner in connection with primage and average, and its amount was stated, and by the indorsement on the bill of lading the master's expenses were expressly described as "to be deducted from the freight." *Gumm* v. *Tyrie* (2), if it proves anything, proves that though a man who is owner of the vessel and owner of the goods shipped in it, cannot make himself liable to himself for freight, he can create that liability where the interest of other persons is concerned. That case is, therefore, an authority for the Respondents.

As to the claim of set-off there were no mutual debts here. The bills were not at maturity on the 9th of January, 1865. They were drawn while the vessel was at sea, and were not due till the 23rd of February. So that when *Thomson & Bonar* were affected with notice of the assignment, no debt from *Holm* to them had accrued: *Watson* v. *The Mid-Wales Railway Company* (3). The assignment of an equitable chose in action does not create a right of set-off unless there is an actual intention to create it.

May 27.

LORD CHELMSFORD:—

My Lords, the question upon this appeal is, whether the Appellants, who are partners in, and constitute the firm of, *Thomson & Bonar*, are bound to pay to the Respondents the amount of freight

(1) 11 C. B. (N.S.) 842; 31 L. J. (C.P.) 214; see *Lewis* v. *M'Kee*, Law Rep. 2 Ex. 37.

(2) 4 B. & S. 680; affirmed 6 B. & S. 298.

(3) Law Rep. 2 C. P. 593.

upon a cargo of rice shipped at *Akyab*, in a vessel called the *Java*, and consigned to them. The Respondents claim the freight as having been placed at their disposal as a security for the repayment of a sum of £3300 lent and advanced to *John Holm*, the owner of the vessel. The Appellant's answer to this claim is, that no freight was payable for the cargo of the ship *Java*, as *Holm* was the owner of both ship and cargo, and could not create a charge in favour of the Respondents in priority to the right of the Appellants as consignees to have the cargo delivered to them without any payment.

The question depends upon the construction of the contract between *Holm* and *Thomson & Bonar*, which is contained in two letters written by them respectively on the 26th of December, 1863, and the 11th of January, 1864. That by *Holm* is, so far as is material in this case, in the following terms :—[His Lordship read the letters, the bill of lading, and the indorsement; see *ante*, pp. 287, 288.] It was observed that the bill of lading is not in the accustomed form as to payment of freight, that is "he or they paying freight," &c., but it amounts to the same thing by the words "freight upon the goods net delivered." *Thomson & Bonar*, with this shipping document before them, accepted bills for £4450, which was explained to be the exact amount of the maximum rate of freight at £5 per ton of 840 tons of rice, with the addition of £250, the amount of the disbursements which by the indorsement upon the bill of lading was to be "deducted from the freight on settlement thereof."

The claim of the Respondents arises upon two bills of exchange amounting to £3300 drawn by *Holm* upon and accepted by them, and *Holm*, in a letter of the 8th of November, 1864, sending the bills for acceptance, writes, "on the other hand I hereby, as security, place at your disposal the freights *Java* and *Frederik*." The Respondents, upon the arrival of the *Java*, claimed to have the freight applied to the payment of the amount of the two bills of exchange so accepted by them; and *Thomson & Bonar*, on the other hand, claimed for the whole of the cargoes freight free. The Respondents filed a bill against *Thomson & Bonar*, praying to have it declared that they had a valid charge on the freight of the *Java* for the amount due to them on the bills of exchange. The

1873
WEGUELIN
v.
CELLIER.

Master of the Rolls dismissed the bill upon the ground that *Holm* was owner of the *Java*, and also of the cargo of rice shipped on board, that a man cannot enter into a contract with himself, therefore when the owner of a ship carries his own goods in his own ship, no freight is payable to himself on account of the carriage. Upon appeal to the Lord Chancellor, his Lordship was of opinion that the Plaintiffs (the Respondents) were entitled to a decree, and ordered that the decree of the Master of the Rolls for the dismissal of the bill as against the Defendants (the present Appellants) be reversed.

Upon the argument of the present appeal reliance was placed upon a statement by *Holm* in his affidavit that it was his invariable custom to cause a reservation of freight to be inserted in all bills of lading signed by the captains of his ships, although the cargo might, in fact, be shipped on his account, in order that, as owner of the ship, he might be able to receive or deal with such freight independently of the cargo. But if *Holm* had a right to reserve freight upon cargoes shipped on his own account in his own ships, the proof that it was his custom to do so was immaterial; and if he had no right to reserve freight under such circumstances his custom to do so would be of no avail. Some stress was laid upon a letter from *Holm*, of the 22nd of August, 1864, as shewing that no freight was intended to be payable upon the bill of lading. The passage referred to is in these terms: "I hope it won't take long till you get the samples of the cargo as well as the shipping document, and as it will take a good time before the arrival of the vessel, I trust the prices will have advanced, leaving a margin which may be termed a good freight." There can be no doubt that the term "freight" is not used here in its technical sense, but as meaning the profit to be derived from the employment of the ship. But I do not see how that bears upon the question whether freight in its common acceptation was payable under the shipping document, which must be determined by the terms of the instrument itself.

In order to remove the objection to the reservation of freight, upon which the Master of the Rolls decided the case, it was contended by the Respondents that *Holm* was not the owner of the cargo of rice, but that *Halliday & Bullock*, who had pur-

chased and shipped the rice, though for his account, were the owners. There is no doubt, according to the case of *Feise* v. *Wray* (1), that *Halliday & Bullock*, as between themselves and *Holm*, were in some respects vendors of the rice, so as to have a right to stop *in transitu* on the bankruptcy of *Holm*, if the cargo had been shipped to his order. They, however, by the bill of lading made the cargo deliverable to *Thomson & Bonar*, or their assigns. It was not, therefore, the case of the owner of a cargo shipping it on board of his own ship. *Holm* had no control over the cargo, and could not have diverted it from its destination to *Thomson & Bonar*. There seems to be no reason why in this state of things the cargo might not be made deliverable on payment of freight. If the rice had been shipped by *Halliday & Bullock*, as agents for *Holm*, to be delivered to order or assigns, that would have reserved the property to *Holm*, and as long as he remained the owner of the rice the reservation of freight would, of course, have been inoperative. But if *Holm* had indorsed the bill of lading, the indorsee receiving the goods in pursuance of it would have been bound to pay the freight made payable upon delivery. I see no reason why *Thomson & Bonar* should not have been liable to the payment of freight. As the rice was bought by means of advances made by them, and the cargo was to be consigned to them as a security for the repayment of these advances, they might have expected that the shipping documents would have been made out for its delivery to them freight free. But before they accepted the bills of exchange they had received the bill of lading, stated in the covering letter "to be made out to their order, and with ship's disbursements indorsed thereon." Their attention was particularly called to the form of the bill of lading, and to that most important indorsement upon it,—of the amount of the ship's disbursements being to be deducted from the freight on the bill of lading on settlement thereof. It was said in argument that the reservation of freight in the bill of lading and the indorsement upon it had escaped *Thomson & Bonar's* attention. I think this is highly improbable. But assuming it to be the case it cannot alter their position. If they chose to take upon themselves the liability imposed by the bill of lading, whatever it might be, they are bound

(1) 3 East, 93.

1873

WEGUELIN v. CELLIER.

by its terms whether they had made themselves acquainted with them or not.

I am of opinion that the decree of the Lord Chancellor reversing the decree of the Master of the Rolls upon the question of the liability of *Thomson & Bonar* to pay freight upon the cargo of the *Java* ought to be affirmed.

A question was brought forward in the argument at your Lordships' Bar which does not appear to have been suggested in the Court below, nor is it stated in the Appellant's case, and the reason for the present appeal, nor was it raised upon the pleadings between the parties. It was argued that as *Thomson & Bonar* had made large advances to *Holm*, far beyond the amount of the freight of the *Java*, they have a right to set off their debt against the Repondent's right to the freight, and so to extinguish their claim. I do not see upon what ground this can be a case for set-off. *Thomson & Bonar*, the holders of the bill of lading, could not obtain the cargo without payment of the freight, nor could they have withheld such payment on the ground that *Holm* was indebted to them. The captain of the *Java* would have been entitled if not bound to insist upon the payment of the freight before the delivery of the cargo. The Respondents had placed a stop on the cargo for the freight, and they had given to *Thomson & Bonar* notice of their title and of the cargo being stopped for freight. The Respondents had, therefore, a lien for the freight which *Thomson & Bonar* were bound to discharge. They cannot insist that this obligation does not exist because money is due to them from the person who created the right to a lien, which is paramount to any claim which they have upon the cargo. Nor can this lien, which is not of the nature of a debt, be defeated by a set-off, which can only be applicable to the case of mutual debts. This claim of the Appellants, in my judgment, furnishes no objection to the affirmance of the decree.

LORD COLONSAY:—

My Lords, it appears to me that in this case the judgment of the Master of the Rolls proceeded upon the ground that the whole case was to be determined upon the correspondence which took place between *Holm* and *Thomson & Bonar*, and *Halliday & Bullock*,

and that the bill of lading which afterwards accompanied the cargo was really a matter of no importance in the case, while, on the other hand, the judgment of the Lord Chancellor appears to have proceeded mainly upon the ground that the bill of lading was the "shipping document" in this case; that its conditions were taken and accepted by *Thomson & Bonar* when they received and adopted that bill of lading, and accepted the drafts which were made as against the shipping documents, and also when they sought to vindicate their right in the cargo which had been carried by this ship. The Master of the Rolls held that there had been a clear arrangement between *Holm* and *Thomson & Bonar*, to the effect that the cargo was to be sent home as a cargo belonging to *Holm*, and in his own vessels; that this did actually take place, and that, in that condition of matters, it was impossible that what is in law considered as freight, a right which carries along with it certain conditions and privileges, such as lien, could exist, inasmuch as a man cannot contract with himself, and freight is the result of a contract as between the owner of a vessel and the owner of the goods carried in it, or some other arrangement of that kind.

Now, my Lords, I must say that it appears to me that if this case is considered with reference to the condition of matters when the bill of lading was received by *Thomson & Bonar*, and acted upon by them, and with reference to the ordinary understanding in regard to goods so sent and preceded by such documents, there could be little or no difficulty in determining it. The bill of lading set forth that the goods were shipped by *Halliday & Bullock*, and that they were shipped to *Thomson & Bonar* themselves. The bill of lading also stated that freight to a certain amount was chargeable upon those goods; for I hold that the absence of the words, "he or they paying," was of no consequence in the construction of this bill of lading. The bill of lading clearly imports that there is a freight chargeable in reference to the carriage of these goods, and if it had not been for the previous transaction with *Thomson & Bonar*, and the position in which they were placed with regard to *Holm*, I apprehend that no argument could possibly have been maintained upon the absence of the words "he or they paying." If the matter be treated upon the footing that

1873

WEGUELIN v. CELLIER.

these bills of lading, and the cargo sent in accordance with them, and the advances made in reference to them, govern this case, I see no difficulty at all in holding that the freight was a matter for which a lien existed over the cargo, and that the Respondents in this case, who were the assignees of the freight, are entitled to our judgment.

But the Master of the Rolls has held (and that is a matter which requires consideration), in the first place, that there was a clear understanding between *Thomson & Bonar* and *Holm* that the goods were to be his own property, and were to be sent in his own ships; and he has held, secondly, that in that state of matters the law does not allow the existence of such a thing as freight to be charged; and, finally, he has held that the transaction was one in which *Thomson & Bonar* were to be regarded independently of the bill of lading, and merely as mortgagees of the cargo in respect of their transactions with *Holm*. There is a good deal in that argument which appears to me to be rather assumptive than supported by authority. In the first place, as to the letter of the 26th of December, 1863, which was the origin of this transaction, in which the request was made for credit to be given to *Halliday & Bullock*, it is undoubtedly true, upon the tenor of that letter and of the subsequent correspondence also, as it appears to me, that *Holm* intended this adventure to be an adventure of his own, and it is plain that he mentioned that the rice was to be shipped in vessels of his own. But it is taking a wide step from that to say that it was a condition of the proceedings that as the rice was shipped in vessels of his own no freight was to be charged; in short that the rice was to be carried free. *Holm's* original letter does not say so, and the letter of *Thomson & Bonar*, addressed to *Halliday & Bullock*, telling them of their willingness to grant them the credit, or granting the credit, while it states that the goods were to be on account of *Holm*, does not make any reference to that which is now asserted to be an essential condition, namely, that they were to be carried free.

But farther, is it an absolute rule that where an owner of a ship makes an adventure in a cargo, the law renders it impossible that he shall assign the freight, and that no assignee shall have a lien over the cargo for the freight if that cargo has been disposed of to

1873
WEGUELIN
v.
CELLIER.

some other person? I am not sure that there is any such rule at all. It appears to me that there are various circumstances under which it is quite possible, competent, and proper, for the owner to do so. In fact, if he kept his accounts as he ought, as a shipowner, to keep them when he entered into an adventure, he would keep his account with this vessel, the *Java*, and put to its credit the freights it was earning, or ought to earn, and those freights would stand in his books as belonging to him; on the other hand he would debit the cargo with the proper freight for the vessel—and the balance between these two would be the profit resulting to him from the adventure. These goods and this freight were two separate things which belonged to him in two separate characters, and it might be convenient to him, with a view to disposing of the cargo afloat, or of dealing separately with the cargo and the freight, that they should be so marked out, and I know of no reason why he should not do so. Again, if he had sold this vessel in the port of shipment with all its acquisitions, there would be no reason why there should not be a freight inserted in the bill of lading, and made a right which would follow the purchase of the vessel. In this case, I think, he sold the cargo, and the purchasers claimed the freight, but they were under a condition which made it clear that they would not establish a right to that freight which had been assigned to the Respondents in this appeal. Therefore, it is taking the rule too absolutely to hold that there is a legal impossibility of creating that thing which is called freight in a case in which the cargo and the ship belonged at the time of the shipment to the same person.

But, farther, the Master of the Rolls seems to hold it as clear that all right in this cargo was vested in *Holm*, and that the right of *Thomson & Bonar* to it was not anything else than a right of mortgage by way of security for their advances. I can hardly give that construction to a bill of lading which says that the cargo was shipped to them. I think that not only gave them the dominion over the cargo but vested the cargo in them. It gave them a right to the cargo. No doubt *Holm* had certain equitable rights as against them afterwards, but still the cargo was theirs. It is not clear to us how he stood with *Halliday & Co.*, but at all events upon the face of the transaction as described in the bill of

1873
WEGUELIN
v.
CELLIER.

lading, the cargo being shipped by *Halliday & Co.* direct to *Thomson & Bonar* with a reservation of freight, I think it was a transaction which ought to have made *Thomson & Bonar* aware that there was a freight chargeable. I think that under the circumstances *Holm* was not prohibited from charging freight, and had a legal right to charge it. Not only did the bill of lading bear that the freight was to be payable, but the attention of *Thomson & Bonar* was specially directed to it by the note upon the bill of lading, which shewed that payments had been made on account of the vessel which were to be deducted from the freight. In that state of matters, and with all that knowledge, they accepted the drafts, and then they used this bill of lading as the title which they held to the goods. It was a title which on the face of it shewed that there was payment to be made for freight, and that payments had already been made which were to be deducted from the freight. And they having acted upon that as the ground of their claim to the cargo, I think it is impossible for them to repudiate the condition attached to that bill of lading, which is a bill of lading made in the ordinary form, though not exactly in the same words, as those documents are usually made.

Upon these grounds, my Lords, I think that the reasoning of the Master of the Rolls falls short of the substance of the case, and also of the form of the case, for the form of the case is that which I have alluded to, of a party receiving a cargo with such a bill of lading attached to it. I do not see that those parties who took the assignment of the freight are precluded from their right because of any inference deducible from the letter of the 26th of December, that it was a concluded agreement between *Holm* and *Thomson & Bonar* which the law made absolute and unchangeable, that they were not to charge freight in respect of those goods. Upon these grounds I am for affirming the judgment.

LORD CAIRNS :—

My Lords, I concur so entirely with what has fallen from my noble and learned friends that I do not think it necessary to repeat their arguments. I have considered this case again, and I hope without any prejudice arising from the fact that it is an

appeal from a judgment of my own, but I do not see a possibility of arriving at any other conclusion.

1873
WEGUELIN
v.
CELLIER.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 27th May, 1873.

Solicitor for the Appellants: *H. P. Sharp.*
Solicitor for the Respondent: *Kearsey.*

THE ATTORNEY-GENERAL AT THE RELATION OF FREDERICK BAILEY AND OTHERS . . . . . } APPELLANTS;

AND

THE MAYOR, ALDERMEN, AND BURGESSES OF CAMBRIDGE . . . . . } RESPONDENTS.

1873
June 9, 10.

Market—"Enlarge."

In the *Cambridge Market Act*, 1850, power was given to the mayor, aldermen, and burgesses in council, to "enlarge," as well as improve the market of that borough:—

Held, that the meaning of the word was not restricted to merely extending the market to streets theretofore forming parts of its sides, but authorized them to extend the market to other streets in its immediate neighbourhood, even though such streets were not mentioned in the Act.

The words in the Act the "market place," were not confined to the *Market Hill*, but extended to streets where *de facto* the market had been held.

The general object of the Act being to enlarge and improve the market of the borough, the mayor and aldermen, who had the right to hold markets in the borough, though by the Act not authorized to enlarge an existing corn exchange, were held authorized to erect a new corn exchange, and make it adjoin the borough market, such being, in their opinion, a matter of public convenience, and an enlargement and improvement of the market.

The borrowing powers of the corporation explained.

THIS was a case involving the construction to be put on the *Cambridge Corporation Act*, 1850, with reference to the powers of

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

the Respondents to build a new corn exchange in a place which they had decided to be fit for that purpose.

The chief market at *Cambridge* had long been held in a particular place there called *Market Hill*, but the space where it was held had been found too contracted, and several of the neighbouring passages and streets had been occupied by stalls on the market day. In 1849 an extensive fire occurred on and adjoining *Market Hill*, and it was then determined to apply to Parliament for powers to alter and enlarge the market by throwing into it certain passages and streets which had been usually occupied by stalls on the market day. This determination was acted on, and Parliament passed the *Cambridge Corporation Act*, 1850. The preamble recited that the mayor, aldermen, and burgesses of *Cambridge* claimed to hold the borough from the Crown in fee farm, and to be owners of the fairs and markets thereof, and also to be owners of a fair at *Reach*, at, &c., and that it was expedient that provision should be made for the better regulation of the said fairs and markets, and for the enlargement and alteration of the market place of the said borough, and the approaches thereto, and the enlargement or rebuilding of the *Guildhall*, and for other purposes. The *Lands Clauses Consolidation Act*, 1845, and the *Markets and Fairs Clauses Act*, 1847, were declared to be incorporated in this Act. The 4th section of the Act declared that the mayor, aldermen, and burgesses should be the "undertakers for the purpose of enlarging and improving the market place hereinbefore mentioned, together with all proper works and conveniences connected therewith and belonging thereto, and for managing and regulating the same, and also the fairs within the said borough," and certain others therein mentioned.

For this purpose the 13th section empowered the Respondents to borrow a sum of money not exceeding in the whole £40,000, and in the event of part of such money being repaid, to reborrow the same; so, however, that the debt should never exceed £40,000; for which they were to be allowed to mortgage the borough fund.

By the 16th clause they might "take and use the land and hereditaments specified in the schedule (B) to the Act annexed, and any other lands which they may purchase by agreement, and may enlarge or rebuild the present *Guildhall*, or erect a new one on a

more eligible site, and may, for the last mentioned purposes, or either of them, or for other the purposes of this Act, and the Acts incorporated herewith, take and use any lands which they may purchase by agreement." The schedule (B) enumerated only *Market Hill, Warwick Street, St. Mary's Passage,* and *Union Street.*

The Act gave the Respondents power to purchase the houses in certain streets, and the 21st clause recited that when the houses in *Warwick Street,* one of the streets in Schedule B., were pulled down, the street would be useless as a thoroughfare, and gave the Respondents authority to put an end to any right of way there.

By the 22nd clause it was enacted "that the sum to be annually set apart and appropriated out of the borough fund as a sinking fund to be applied in paying off the principal moneys borrowed or secured on mortgage under the provisions of this Act, or the Acts incorporated herewith, shall be such part of the moneys from time to time so borrowed as aforesaid as the mayor, aldermen, and burgesses shall from time to time order, not being less than £1 for every £100 so borrowed."

The 54th clause, or interpretation clause, enacted that "the words 'the borough' shall mean the borough of *Cambridge,*" that "the words 'the market place,' shall include all places whatsoever within the borough of *Cambridge* wherein the markets thereof were usually holden at the time of the passing of this Act, or wherein the same shall hereafter be lawfully holden within that borough."

"The word 'fairs,' shall mean all fairs within the borough of *Cambridge* and the fair of *Reach.*"

The Respondents borrowed the sum of £40,000, and after purchasing the lands and houses specified as necessary for improving and enlarging the borough market, determined on erecting a new corn exchange to adjoin the market. This would require more money, which must therefore be obtained from that already borrowed for the new market, or by a reborrowing under the Act. The Appellants insisted that (although a large part of the original borrowing had been paid off) the Respondents had no authority to enter on this new expense. The site for this new corn exchange appeared to be the great matter in dispute. At the southern extremity of the ground called *Market Hill,* and intended to be the site of the new market, was a street called *Wheeler Street.* This

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

street ran in an easterly direction from *King's Parade* to *Corn Exchange Street*, and from the corner where *Wheeler Street* and *Corn Exchange Street* joined, ran down the last-named street in a southerly direction to what had been for some years the site of the *Corn Exchange*, which was situated under *St. Andrew's Hill*, just where it joined *Downing Street*. It was objected that to erect a new corn exchange on the southern side of *Wheeler Street* was not to enlarge or to improve the market, but was a new and independent scheme, not within the words of the Act of 1850.

On the 8th of June, 1870, certain inhabitants of the borough, to test the right of the corporation to proceed in this matter, filed an information in the name of the Attorney-General to restrain the mayor and aldermen (the now Respondents) from accepting tenders or entering into any contract for the erection of a new corn exchange, and from applying any part of the borough fund for such purpose. The Respondents having put in their answer, a motion was made before Vice-Chancellor *Bacon* in December, 1870, for an injunction, which was granted. The Respondents appealed to the Lords Justices, by whom, on the 8th of March, 1871, the order for an injunction was discharged. The cause was then heard before the Master of the Rolls, who, on the 29th of June, 1871, made a decree in accordance with the opinion previously expressed by the Lords Justices. The case was then brought up to this House.

Mr. *Fry*, Q.C., and Mr. *Benjamin Bickley Rogers*, for the Appellants, insisted that the *Cambridge Corporation Act*, 1850, did not give the Respondents any such power as they now claimed to exercise. The words of the Act restricted the powers of the Respondents to the market place of the borough, which was the *Market Hill* and those streets and passages immediately adjoining, and named in the Schedule B. *Wheeler Street* was not in the schedule, and it was not a part of what had been or was intended to be the new market. Nor was there in the Act any authority to make a new corn exchange. *Le Neve* v. *Mile End Old Town* (1) shewed that powers conferred for such purposes as those contemplated by this Act must be strictly guarded. There long usage as

(1) 8 El. & Bl. 1054.

to the employment by individuals of open spaces of ground was not allowed to be interfered with by persons authorized to make improvements, even though specially so authorized for the public benefit. Those persons were required to observe the very words of the Acts giving them authority, and to keep within the provisions. They could not, on the pretence of public convenience, assume to do more than was literally commanded by the Act to be done. That case was the more important as the matters there intended to be done were really intended for the public convenience, and consisted in removing obstructions which originally had been nothing but usurpations on parts of a public highway. *Market Hill* was here the only place which was the real site of the borough market, and to the improvement and enlargement of that market the powers of the Respondents were confined. As to a change of site, the only matter as to which that was contemplated was the *Guildhall*, and the expression of it there was an exclusion of it as to everything else. The *Corn Exchange* was at a distance; it had no connection with the market, and it had not been included in the words of the Act of 1850, and was not meant to be subjected to the power of the Respondents. There was no borrowing power except with relation to a security on the borough fund; there was no power to re-borrow except to the amount of any sums paid off; and then the re-borrowing must not bring the whole debt up beyond a certain amount, namely, the amount of £40,000, that being the limit originally fixed. Now, neither as to the borrowing or re-borrowing powers was anything said about the *Corn Exchange*, and yet it could not be built without the aid of the money which the Act authorized to be raised. The land where the Respondents proposed to put it was separated from the market by buildings and by a street, and they could not carry their plans into operation without effecting changes which the Act had never contemplated, and incurring expenses which the Act had not authorized them to incur.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Kay*, Q.C., for the Respondents:—

The Act was intended to give the mayor and aldermen the powers which they now seek to exercise. Its object was the im-

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

provement and enlargement of the market, and the market is not restricted to the place bearing the name of *Market Hill*, for in fact the real business of the old market never had been—it never could be—confined to that place, but extended into many of the neighbouring streets. As the *Corn Exchange* now stands, it is separated by blocks of houses and by some distance from the general market. It will be of public advantage to make it adjoin the general market, and its doing so will be an improvement such as the Act contemplated should be made. The right to hold the market is vested in the mayor and aldermen, and wherever a right to hold a market is vested in an individual—as, for instance, in a lord of a manor to hold the market within the manor, or in a mayor and aldermen to hold markets within the limits of a borough—the persons possessing that right may change the site of the market from one spot to another, provided only that they keep within the limits of the manor or the borough, and are endeavouring to promote the public convenience: *Curwen* v. *Salkeld* (1); *Rex* v. *Cotterell* (2); *De Rutzen* v. *Lloyd* (3). In construing an Act passed for such purposes as this the Courts will construe not restrictedly, but liberally, the clauses of the Act, and give a fair intendment to the dealings of the persons who are entrusted with its execution: *Galloway* v. *The Mayor, &c., of London* (4). In no way whatever had the Respondents exceeded their powers, but had acted within the scope of the Act, the object of which was to enlarge and improve the market of the borough.

Mr. *Fry* replied.

LORD CHELMSFORD:—

My Lords, the short question upon this appeal is, whether under the powers conferred by the *Cambridge Corporation Act*, 1850, for enlarging and improving the market of the borough, the Respondents are empowered to build a new corn exchange on a site which they have already purchased, and to exercise their borrowing powers for that purpose, charging the loan upon the borough fund.

(1) 3 East, 538.
(2) 1 B. & Ald. 67.
(3) 5 Ad. & El. 456.
(4) Law Rep. 1 H. L. 34.

My Lords, from the evidence it appears that the principal market within the borough to which the Act refers is a market which was held on Saturdays, extending over *Market Hill*, *Peas Hill*, and *Butchers' Row* (now *Guildhall Street*), and frequently "overflowing," as it is said, into the adjoining streets. My Lords, it appears to me that there was no particular spot which had acquired the distinctive name of "the *Market Place*." There was a place called "*Market Hill*," which probably was the principal part of the market. The evidence of the toll collector, *Brown*, is this: "I do not recollect that the market was ever confined to *Market Hill*, and did not extend to *Peas Hill;* I never heard any other place but *Market Hill* called the '*Market Place*,' and the *Market Hill* was universally looked on as the '*Market Place*.' No doubt popularly it was known as the '*Market Place*,' and in speaking of it they would speak of it as the '*Market Place*,' but not exclusively so, because if they had to mention the market, *Peas Hill* would probably be mentioned just as *Market Place* or *Market Hill*." He then says: "*Peas Hill* has always been regarded as part of the market; I have always collected tolls there. The market overflows down *Market Street*, *Petty Cury*, and *Butchers' Row;* in all those places I used to take tolls."

Then, this being the state of things, the question is, What is the meaning of the term "the market place," in the *Cambridge Corporation Act*, 1850? A fire had occurred in the market place in the year 1849, and the opportunity was then taken for improving and enlarging the market. The *Cambridge Corporation Act*, 1850, was accordingly passed. In the preamble of that Act it is stated that, "It is expedient that provision should be made for the better regulation of the said fairs and markets, and for the enlargement and alteration of the market place of the said borough and the approaches thereto;" and by the 4th section the mayor, aldermen, and burgesses of the borough of *Cambridge* are appointed the undertakers for the purpose of enlarging and improving the market place thereinbefore mentioned. Then follow other clauses:—[His Lordship here read the 13th, the 16th, and the 56th clauses of the Act.] Then the interpretation clause becomes important. The interpretation clause enacts that "The words 'market place' shall include all places whatsoever within the borough of *Cam-*

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

bridge wherein the markets thereof were usually holden at the time of the passing of this Act, or wherein the same shall hereafter be lawfully holden within that borough."

It is said, with regard to this interpretation clause, that it applies to all the markets within the borough. And it is said that if not, the interpretation clause would have no application at all. For my own part I am satisfied that the Act applies to one particular market; and it appears to me that the borough fund could not be charged with the enlargement and improvement of the existing *Corn Exchange*, which is a corn market. I think also that the general Act, the *Fairs and Market Act*, will not help the Respondents, although the 9th section authorized any lands within the limits of the Act to be purchased by agreement or contract for the formation or the convenient use of the market or fair. Though the *Cambridge Corporation Act*, 1850, enacts that the *Markets and Fairs Act* shall be read as if the words "enlarging the market" had been inserted instead of "constructing the market," yet if "the market place" has a limited meaning attributed to it, the incorporated Act cannot extend its scope beyond what is necessary for the enlargement of the particular subject. But then I do not think that the words, "the market place," will bear the narrow construction put upon them by the Appellant. There is no place, as I have already observed, to which the name "the market place" applies. There is a place where the market has been held, and it appears to me that, looking at all the circumstances which I have adverted to, the Legislature, in using the terms "the market place," in the *Cambridge Corporation Act*, 1850, meant the place where *de facto* the market was held.

My Lords, the power is to enlarge and improve the market place, the market place being, as I understand it, the place where the market is held. Then what is the meaning of the word "enlarge?" We have had a great deal of criticism on the subject, but it appears to me that it is sufficient to say that it will bear this meaning, "to increase the space in which the market is held." If that be so, then, according to the evidence as to the extent of the market, certainly *Market Hill* was part of the market, and *Peas Hill* and *Butchers' Row*, and that the market extended or overflowed, as it is called (which is an incorrect expression), at

times into *Petty Cury*, *Market Street*, and *Butchers' Row* (which is now called *Guildhall Street*). Then the interpretation clause applies here. It is to include "all places whatsoever within the borough of *Cambridge* wherein the markets thereof were usually holden." Can it be said that under this interpretation clause the words "the market place" do not include, amongst others, *Petty Cury*, *Market Street*, and *Butchers' Row*, where certainly the markets were usually holden? It appears also that tolls were taken in all these places. Then if that be so, it is quite clear to my mind that the powers of enlarging the market, conferred by the Act, gave to the Respondents the power to do what they are proposing to do, namely to take a site, which is close upon those parts of the market—*Butchers' Row*, and other places—sufficiently near to render it clear that it will be an enlargement of the market in the sense of increasing the space upon which the market is held.

Now, my Lords, there is no necessity to consider the argument which has been urged before your Lordships, that if this interpretation clause is to extend, as is contended, it will give the corporation the power to increase the market by in fact constituting or erecting a new market in any part of the borough. Really there is no ground whatever for supposing that there could be that enlarged construction given to these expressions, and there is no reason to think that the Respondents (though it is suggested that it might be so) were not acting *bonâ fide* in proposing to enlarge the market in the way which has been suggested. It appears to me that the Vice-Chancellor has made a mistake with regard to what was intended to be done, and as to what was the proposal of the Respondents, for he says in his judgment: "Now the proposition on the part of the corporation is that they are at liberty to remove the corn exchange, mart, or market, or whatever it was, but not a market place, up to *Wheeler Street*, and to do that in exercise of the powers which the statute has conferred upon them." That is not what the Respondents propose. They do not, in fact, propose to remove the corn exchange, what they propose is to improve the market, that is, to enlarge the market by building a corn exchange, and so to give increased space upon which the market is held.

My Lords, I have no doubt whatever that the opinion at which the Lords Justices arrived was the correct one, and that this is

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

within the powers conferred by the *Cambridge Corporation Act*, 1850, and therefore that the decree of the Lords Justices ought to be affirmed.

With regard to the question as to the borrowing powers, there is very little to be added to the observations which were made in the course of the argument. The Respondents have the power to borrow on mortgage or bond any sums of money not exceeding in the whole the sum of £40,000 on the credit of the borough fund. They have also the power, in the event of any part of that sum being repaid, to reborrow the same, but so nevertheless that there shall not be owing on the security of that Act any more in the whole than the sum of £40,000 at any one time. It appears that the Respondents had borrowed £40,000, and that they had paid off £32,000. As to how that £32,000 has been paid off we have no evidence at all, but there remains out of the £40,000 a sum of about £16,000. The exact amount does not signify. Now it is contended that the Respondents having borrowed £40,000, though it is not insisted that it was necessary that it should be all borrowed at one time, but from time to time, the power is exhausted, and that they have no power at any future time, supposing any part of it is paid off, to re-borrow. It is said that at all events, supposing the £40,000, or any portion of it, had been repaid out of the sinking fund, they have no power to reborrow to the extent of £40,000. I do not think it at all necessary to enter into the question whether, supposing the whole of the £40,000 had been repaid out of the sinking fund, there would still remain in the Respondents the power to re-borrow any farther sum whatever. But undoubtedly the Respondents have under this 13th section, in the event of any part of the moneys being repaid, power to reborrow. And when it is contended, on the other side, that they have no re-borrowing power existing, those who make that contention ought to have shewn that the money had been repaid out of the sinking fund, and not repaid out of the other funds of the corporation, because it was admitted on the part of the learned counsel for the Appellant that if any portion of the money had been repaid out of the funds of the corporation, and not out of the sinking fund, they would have re-borrowing power.

Under these circumstances, there being no proof given as to how

the money was repaid (and I take it for granted that if it had been capable of proof that the sinking fund had been applied in satisfaction of part of the debt of £40,000 that evidence would have been given), and it being the bounden duty of those who object to the Respondents having this re-borrowing power to have shewn by evidence that they were deprived of it, I think, as no evidence of that sort was presented to the Court, that the conclusion at which the Lords Justices arrived was right in this respect also, and that their decision ought to be affirmed, and that this appeal ought to be dismissed with costs.

LORD COLONSAY :—

My Lords, this question arises upon the Act of 1850, with reference to the powers thereby conferred, and it is, substantially, whether in the exercise, or proposed exercise, of those powers the Respondents in this case have exceeded, or are exceeding, the powers conferred upon them, or are acting in abuse of those powers. It is contended that they are exceeding the powers, or are acting in misconstruction of the powers, because they are dealing with a subject which they have no power to deal with, and by means of funds which they have no power of applying to that purpose.

The question arises upon the construction to be put upon the words of the Act of Parliament as to the market place. I think that the market place in the Act of Parliament, looking to the interpretation clause and to the evidence, is not confined to what is called *Market Hill*. I think it confessedly goes beyond that—it comprehends the place called *Peas Hill*—and I think it would comprehend all the area round which the markets were in use to be held. That being so, I think we cannot put the limited construction which the Appellant contends for, and I think that the place in which the powers are proposed to be exercised is reasonably and properly within or convenient to the area upon which the market was used to be held ; and I think that the subject of a corn market, or a corn exchange, is a proper subject to be within the scope of the improvement of the market place and the conveniences connected therewith.

Then is this proposed to be done by the misapplication of the borrowing powers ? I think not, as far as I can see from the evi-

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

dence before us. It is said that it is in excess of those powers, that they are not entitled to borrow money or to apply money to this purpose, inasmuch as it is a duty to keep up the sinking fund, and that if they paid off anything out of that sinking fund it is then extinguished, and they have no right to re-borrow. But under the Act of Parliament they certainly have the power of borrowing, the power of paying off, and the power of re-borrowing. And if it is contended that they are exercising that power improperly or unjustly, then we require to have before us some evidence or some distinct statement of wherein that improper exercise of the power consists. It is incumbent upon those who allege that the powers are exercised in excess of the object to shew us that they are so. Now I do not find here any statement either as to the sinking fund, or to the mode in which the sinking fund has been used. I do not find any evidence as to what was paid into this sinking fund, or as to what is now in the sinking fund, or as to what has been taken out of the sinking fund, or that any part of what was the sinking fund has been applied to the repayment of the sums borrowed. I cannot, therefore, adopt that statement as correct, and I cannot hold that in that there is any misuse of the powers conferred upon the Respondents; and I therefore concur in the judgment proposed by my noble and learned friend upon the woolsack.

LORD CAIRNS:—

My Lords, so far as regards the objection which has been made upon the score of the borrowing powers, I must own that the argument has not impressed me in any way in its favour. It appears to me to be an afterthought in the case. I do not mean to say that it has not been urged before some of the Courts from which the appeal comes to your Lordships, although as regards the Vice-Chancellor, it appears to me that the point was certainly not brought in any way prominently before him. It appears to have been urged before the Lords Justices, and to have had no weight with them in their judgment. But what I observe, my Lords, is this, that there is literally no mention of this point in the pleadings between the parties. The bill does not even pray for an injunction against the exercise of the borrowing powers, whereas, had the

argument which has now been urged before your Lordships, any foundation, the right of the Attorney-General to restrain the exercise of the borrowing powers would have been perfectly clear, altogether regardless of any question about the corn exchange, or of the market, or of the use to which the money proposed to be borrowed was to be put; it would have been a separate and independent case to prevent the borrowing of money, and the exercise of the borrowing powers without raising any controversy as to the enlarging of the markets or the corn exchange. In point of fact there is nothing whatever in the prayer upon the subject, and there is no statement in the bill (as was pointed out during the argument) of any kind that would be apposite in such a case, namely, a statement as to the mode by which the money which has been repaid has been repaid; for it was admitted by the counsel for the Appellant at your Lordships' Bar, that the money might be repaid in such a way as would justify a repetition even of the exercise of the borrowing powers. I put that, therefore, altogether out of the case.

Now as to the other question, I will not advert, even for the moment, to the interpretation clause, upon which so much of the argument has turned; but taking this Act of Parliament which your Lordships have to consider, without reference to the interpretation clause for the present, what I find is this: "That the mayor, aldermen, and burgesses of the borough of *Cambridge*, by the council of the same borough, shall be the undertakers for the purpose of enlarging and improving the market place hereinbefore-mentioned, together with all proper works and conveniences connected therewith and belonging thereto, and for managing and regulating the same." Now again, putting aside for a moment the controversy as to what "the market" exactly means, and taking it for the moment to mean the *Market Hill*, even in that most narrow view of the case, as it seems to me, there is clearly to my mind, here, a power to enlarge and improve that limited area, "together with all works and conveniences connected therewith or belonging thereto," which appears to me to be a power to increase the works and conveniences connected with that limited area. So that even if I rested there, and I had nothing more to deal with than those particular words, it being beyond all doubt a fact that a

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

corn exchange may properly be described as a "convenience connected with or belonging to" a market, it seems to me that there would have been ample power upon those words alone to expend the borrowed money in the erection of a corn exchange connected with or belonging to that limited area of *Market Hill;* even although the corn exchange should not be immediately in contact with *Market Hill,* provided it were within such a distance from it as would be a reasonable distance, having regard to this, that the corn exchange was to be a convenience connected with the market.

My Lords, I should be satisfied to deal with the case upon that very simple and narrow ground, avoiding all questions in controversy as to the interpretation clause, or as to the accurate meaning of "market place." But going beyond that, and still not dealing with the interpretation clause, I find that the words used are "the market place hereinbefore mentioned." And the market place mentioned before in the Act is the market place mentioned in the preamble, and there it is called "the market place of the said borough," and it is stated that it is desirable to provide "for the enlargement and alteration of the market place of the borough and the approaches thereto." Now, my Lords, it is as clear as possible in this case that there was no place in the borough of *Cambridge* which was technically called "the *Market Place*" in the way that, for example, we speak of the *Haymarket* or of *Covent Garden Market,* a place known by metes and bounds, the name of which would indicate the boundaries, the extent, the situation, and the ambit of that which was so named. There was a place called *Market Hill* which had metes and bounds, but there was no place in the borough of *Cambridge* called the market place which had known and ascertained metes and bounds. I take it, therefore, that where the Act of Parliament speaks of "the market place of the borough" it means that place in the borough in which the market of the borough was held. And there can be no doubt that although there were minor markets, and places where markets were held, there was a well known principal market of the borough which was held every Saturday, and that the centre and principal portion of that was the *Market Hill.* And I understand these words, "the market place of the borough," to mean the part of the

borough where the principal market of the borough was held. And I should hold, if it were necessary so to decide, (which it is not, for I think it is sufficient to say that the interpretation clause is not to be applied to a statement of this kind in the earlier part of the Act), that the words "the market place of the borough," in the preamble, and also in the 4th clause, mean that the place of the borough where the principal market of the borough was held, at the time when the Act was passed, was that which was to be enlarged, and as to which provisions were made for that purpose.

Well now, that being so, what does the evidence brought before your Lordships as regards this principal market of the borough prove? It proves that the principal market of the borough was held upon the Saturday, and that the centre and principal portion of it was in *Market Hill*, but that it spread over the adjacent area, wherever it could find a vent or outlet, into the streets and thoroughfares surrounding *Market Hill;* that it came up through *Guildhall Street* (or *Butchers' Row*, as it was then called), that it went up through *Union Street* into *Peas Hill*, and that it came to the east and west ends of *Wheeler Street*. And although it does not appear to have actually been held in *Wheeler Street* itself, that apparently, according to the map, might be easily accounted for from the fact that *Wheeler Street* was not a very broad thoroughfare in which a market could conveniently be held; but the market spread over three places which I have described. And if "the market place of the borough" means the place or area where the principal market of the borough was held, the words would properly describe *Market Hill* and those surrounding streets to which I have referred.

If that is so, and if it is not sufficient to look to the corn exchange as a convenience to be held with the market, but if it is to be dealt with as if it were a part of the alteration of the market-place which is authorized by the Act, it appears to me that the words "alteration of the market place," as I understand those words "market place," will fairly be met by the building of a corn exchange to be used as part of the market, coming up to within a few feet of *Guildhall Street* or *Butchers' Row* upon the one side, and coming up to within a few feet of *Peas Hill* upon the other side; the only interjected portion of land between the *Corn*

1873

ATTORNEY-GENERAL v. MAYOR, &c., OF CAMBRIDGE.

Exchange and *Butchers' Row* upon one side, and *Peas Hill* upon the other side, being a public thoroughfare perfectly convenient for the passage of persons coming from the north of the market down to the *Corn Exchange* situated upon the south side of the market. It seems to me that it would be the narrowest possible construction of the word "enlarged" to hold that it must mean simply a pushing back or shifting of the metes and bounds surrounding *Market Hill* and the streets around it, and that it would not be satisfied by the building of a corn exchange in the position I have described, convenient for being used along with and substantially as part of the market.

My Lords, I think therefore, that this being a case in which the Relators, ratepayers of the borough, through the Attorney-General, challenge the legality of the acts which the Respondents are doing, nothing being alleged in the shape of fraud or want of *bona fides* on the part of the Respondents, nothing being given to your Lordships to decide as to the exercise of the discretion of the Respondents, but the simple question raised in the case being whether that which they are doing is *extra vires* or *intra vires* under the Act, the answer to that question must be that the Relators have not in any way established the case which it lay upon them to establish, namely, that that which the Respondents are doing is beyond a just and legitimate exercise of the powers entrusted to them by the Act of Parliament.

I think, therefore, that the appeal fails; and I entirely concur with the motion which has been made by my noble and learned friend on the woolsack, that the appeal should be dismissed with costs.

Mr. *Kaye*:—It will be the decree of the Master of the Rolls that will be affirmed.

Orders appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 10th June, 1873.

Solicitors for Appellant: *Purkis & Perry.*

Solicitors for Respondents: *Field, Roscoe, Field, Francis, & Osbaldeston.*

JAMES DENIS DE VITRE AND OTHERS . APPELLANTS; 1873

AND

WILLIAM BETTS . . . . . RESPONDENT. Jan. 10.

Patent—Election of Remedy for Infringement—Costs.

The rule that, upon a decree against a party for the infringement of a patent, the patentee is not entitled (under the 21 & 22 Vict. c. 27, ss. 2, 5), to have both an account of profits and an inquiry into damages, is now established, and applies to every case of infringement. The patentee must therefore elect which of the two forms of relief he will adopt.

The course adopted as to this matter in *Neilson* v. *Betts* (1) affirmed.

Persons accused of the infringement of *Betts'* patent were Appellants to this House when *Neilson* v. *Betts* was decided. In that case the question of the validity of the patent and the other question of infringement were fully argued. Those questions were decided in favour of the Respondent. But the House also adopted the suggestion of one of the Lords that the decree of the Court below, which had given the Respondent the benefit both of an inquiry into profits and an inquiry into damages, must be varied by restricting him to one of these inquiries alone. After that decision an offer was made by the Appellants in this case to give up the argument on the questions of validity and of infringement, and to withdraw from the appeal, if the Respondent would consent to the varying of the decree. The Respondent declined to enter into any arrangement:

The House followed exactly the course pursued in *Neilson* v. *Betts*, and directed the Respondent to pay the costs incurred subsequently to his declining the proposed arrangement.

THIS was an appeal originally brought against a decree of Lord Chancellor *Chelmsford* in a matter relating to an infringement of a patent for the making of metal capsules for bottles. The decree was the same as the one pronounced in a case of *Betts* v. *Neilson* (2). That case, and the present, were brought up by appeal to this House. The case of *Neilson* v. *Betts* (1) was decided here in March, 1871, when the validity of the patent was sustained and the infringement held to be established; but the decree of the Court below was, on the suggestion of Lord *Westbury* (3),

(1) Law Rep. 5 H. L. 1.

(2) Law Rep. 3 Ch. Ap. 429.

(3) "I have only farther to observe, that the decree of the Court below directed not only an inquiry as to damages, but also an account of profits. The two things are hardly reconcileable, for if you take an account of profits you condone the infringement. I therefore think, my Lords, that we were right in calling on the Respondent's counsel to elect, between the two, which he would adopt. He has adopted the inquiry as to damages, and the other, the account of profits, must be struck out of the decree."—*Per* Lord *Westbury*—*Neilson* v. *Betts* (Law Rep. 5 H. L. 22). This was done.

1873
DE VITRE
v.
BETTS.

varied, by striking out that part of the order of the Court which had directed both an account of profits and an inquiry into damages. The inquiry was, on the election of the Respondent, confined to the amount of damages alone. When the present appeal was in the paper the decision in the other appeal, *Neilson* v. *Betts*, had been pronounced, and a proposition was made by the Appellants' solicitors to the solicitors for the Respondent not to argue the case on the validity of the patent, or on the question of infringement, but withdraw the appeal if he would consent to the proposal to vary the decree of the Court below. The letters which passed between the respective solicitors on this subject will most conveniently appear in the judgments as each noble and learned Lord read and commented on them in turn.

Mr. *Cotton*, Q.C., and Mr. *Kekewich*, appeared for the Appellants, stated the position in which the case now stood, and referred to *Hills* v. *Evans* (1), where Lord Chancellor *Westbury* distinguished between the two modes of relief, and said, "That will be the whole of the decree, unless the Plaintiff prefers, instead of the account, to have liberty to bring an action at law for damages."

Mr. *Kay*, Q.C., and Mr. *Everitt*, addressed the House for the Respondent, and observed, that only in one of the judgments was the question of the double relief by inquiry into damages and by account of profits made the subject of remark, and they submitted that a matter so disposed of was hardly to be treated as a decision of the House, but ought still to be considered as a fit subject for discussion. The two modes of relief had always before been deemed to be rightly conjoined, and, by being so, alone to confer proper and complete compensation on the injured party. And in principle it was clear that it was so. The profit acquired by one man by the infringement of another's patent, did not afford a true measure of the loss sustained by the patentee. The matter had not been argued in this House, but a suggestion was made to counsel in the course of the argument, was enforced in the judgment of one noble and learned Lord, and was, without more consideration, acquiesced in. That might fairly be considered as not a binding precedent. The form of the decree now objected to

(1) 8 Jur. (N.S.) 525–531; 31 L. J. (Ch.) 457–466; 4 De G. F. & J. 288.

was that which had always before been adopted. In *Betts* v. *Neilson* (1) which was the counterpart of this case, and judgment in both was delivered at the same time, Lord Chancellor *Chelmsford* discussed this matter, and expressed a clear opinion that both inquiry into damages and an account of profits might be given together, and, remarking on *Hills* v. *Evans*, shewed that it did not warrant the conclusion attempted to be drawn from it (2), and therefore made the decree, as he thought the statute intended, to include the double form of relief.

No reply was heard; but the Respondent's counsel were asked what they would elect to take, an inquiry into damages or into profits?

Mr. *Kay* elected to take an inquiry into damages.

LORD CHELMSFORD:—

My Lords, the case of *Neilson* v. *Betts* most undoubtedly decided the general principle that, upon a decree against a party for the infringement of a patent, the patentee is not entitled both to an account of profits and an inquiry into damages. That principle applies generally and without any distinction at all. It applies to every case of infringement; and, therefore, it must be taken to have settled conclusively that point, that the patentee must, in all these cases where he has a decree, elect whether he will have an account of profits or an inquiry into damages. He cannot have both. That being so, we understand that on the present occasion the patentee, through his counsel, has elected to take the inquiry as to damages; and of course, therefore, the decree must be varied by striking out that which gives him, in addition, an account of the profits.

(1) Law Rep. 3 Ch. Ap. 429, 440, 441.

(2) The words of the decree are, "And it is ordered that the following account be taken by the Judge to whose Court this cause is attached, that is to say: 1, an account of the making, use, and exercise by the Defendant of the Plaintiff's said invention of an improved mode of manufacturing gas, and of the profits thereby made by the Defendant since the 27th day of January, 1856, the date of the filing of the said disclaimer and memorandum of alterations, and, of such other compensation as is fit to be awarded to the Plaintiff in respect of such making, use, and exercise": *Hills* v. *Evans*, Reg. Bk. 1862, A. 293.

1873
DE VITRE
v.
BETTS.

But then a question arises here out of the conduct of the Respondent, with regard to what I consider was a very fair offer which was made to him, upon the subject of costs. It appears that after the decision of this House in the case of *Neilson* v. *Betts*, the appeal in *De Vitre* v. *Betts*, the present case, having been already lodged, that decision having, in the opinion of the Appellants, decided the question with regard to the double remedy, the account of profits and the inquiry into damages, they made this very reasonable offer to the Respondent's solicitors, "Referring to our communications with you on this matter, we are now instructed to inform you that our clients have no desire to pursue the litigation farther than is necessary; and having regard to the decision in *Neilson's Case*, they are now prepared to offer to withdraw the appeal in the House of Lords, and to pay Mr. *Betts*' costs incurred therein up to the present time, on condition that he will elect to claim either damages or an account of profits, but not both. At the hearing in the House of Lords in *Neilson's Case* their Lordships expressed a clear view on this subject, and we therefore do not anticipate that Mr. *Betts* will hesitate to agree to our proposal." The answer to that was, in the first place, as follows: "In reply to yours dated the 15th instant, our client prefers your adopting whatever course of proceeding you may be advised." That did not finally conclude the matter, because it appears from a subsequent letter that the proposal was still under consideration, for, in a letter of the 3rd of July, the solicitors for the Respondent say, "We do not think that our last letter went the length of declining your proposal; and before doing so we propose to resort to counsel upon the subject; in the meantime kindly let us know what our client's position is to be with reference to the appeal by the company." Then, on the 26th of January, 1872 (which is an important date), the solicitors for the Appellants wrote: "Referring to our previous correspondence, and particularly to our letters of the 15th and 27th of June last, we now beg to inform you that our clients are advised that, having regard to the decision of the House of Lords on the hearing of the appeal of *Neilson* v. *Betts*, it is not competent for them to contest the validity of the letters patent granted to Mr. *Betts*. They are also advised that they cannot with any reasonable prospect of success contend that any

of the several processes complained of by Mr. *Betts* as infringements of his patent rights are not, in fact, infringements thereof. They, therefore, do not propose to argue on the appeal to the House of Lords either of the issues of fact decided in his favour in the Court of Chancery, or to refer to any of the evidence adduced on either side with reference to those issues. The appeal will consequently be limited to the one point, whether Mr. *Betts* must not elect to claim either damages or an account of profits, the Appellants alleging that he is not entitled to both." Then the correspondence is closed by this letter of the 29th of February, 1872: "In reply to yours of the 26th ult., we are instructed to state that Mr. *Betts* does not feel justified in being party to any alteration of the decree herein, with which he is content, and if your clients are desirous of having it altered they must adopt such course as they may be advised."

Now, the question is, under these circumstances, what ought to be done with regard to the costs? I quite admit, as of course your Lordships understand, that the usual course where a decree is reversed is that the Respondent is not fixed with the costs of the appeal. That is the general rule, and their Lordships do not on the present occasion mean to depart from it. The question is, what is to be done under the particular circumstances of this case. There can be no doubt whatever that the offer which was made was an extremely proper one, and one which, under the circumstances, ought to have been accepted on the part of the Respondent. In the course of the observations which have been made to us, it has been said, in the first place, that this application on the subject of costs on the part of the Appellants came on the Respondent entirely by surprise, and that it was never made any part of the claim on the part of the Appellants until the present time. But it appears that, on the 27th of June, 1871, the solicitors for the Appellants wrote: "We are in receipt of your letter, from which we collect that Mr. *Betts* declines to consent to the proposal contained in our last letter. This being so, we have no alternative but to proceed with the appeal and to intimate that this correspondence will be brought before the notice of the House of Lords; and we shall ask that Mr. *Betts* be made responsible for the costs occasioned by his refusal of the offer made by our letter of the 15th instant."

1873
DE VITRE
v.
BETTS.

Now, my Lords, I do submit to your Lordships that the conduct of the Respondent on the present occasion puts him in a position in which it is necessary, I think, for your Lordships to mark your disapproval of that conduct; and, therefore, what I should propose to your Lordships would be this, that the decree should be varied by altering that part of it which gives an account of profits, and by confining it to an inquiry as to damages; and with respect to the costs of this appeal, that the Appellants should pay all the costs up to the 26th of January, 1872, which is the time at which it must be considered the proposal was finally declined, and that, from that time, the Respondent be ordered to pay them.

LORD COLONSAY:—

My Lords, I have nothing to add. With regard to the costs, I think this is an exceptional case. On the other point, according to my recollection of *Neilson* v. *Betts* (1), the object of the House was to lay down a general rule.

LORD CAIRNS:—

My Lords, I think it very important that it should be distinctly understood on what grounds your Lordships proceed in this case. Now, my Lords, the case seems shortly to be this. Mr. *Betts*, the patentee in the case, filed two bills in the Court of Chancery, one against *Neilson* and others, and the other against *De Vitre* and others. Those suits were going on *pari passu*. They came on to be heard before the Vice-Chancellor, who, in both of them, made a decree affirming the validity of the patent, granting an injunction against an infringement, ordering an inquiry as to profits, and an inquiry as to the damages sustained by the infringement. Both those decrees were the subject of an appeal to the Lord Chancellor, and both were argued, as I understand, about the same time, for they came to be decided together. The reasons of the Lord Chancellor were given in form in the case of *Betts* v. *Neilson* (2); but as much the greater part of the judgment related to the validity of the patent, of course it applied exactly to the case of *De Vitre* v. *Betts* also; and with regard to the double inquiry as to profits and as to damages, the Lord Chancellor prin-

(1) Law Rep. 5 H. L. 1. (2) Law Rep. 3 Ch. Ap. 429–440.

cipally, if not altogether, founding himself upon a decree which was produced, which had been made in the case of *Hills* v. *Evans* (1) by Lord *Westbury*, sanctioned that which had been done by the Vice-Chancellor, and continued the double inquiry as to profits and as to damages.

Now, of those two cases, the case of *Neilson* v. *Betts* came to your Lordships' House by way of appeal, and it was argued by *Neilsons*, the Defendants, who were the Appellants, upon all the points in the case, upon the validity of the patent, and in every respect. Your Lordships affirmed the decrees declaring the validity of the patent, and granting an injunction against the infringement; but in the course of the argument notice was taken of the double inquiry, the inquiry as to profits, and the inquiry as to damages. Your Lordships expressed a strong opinion that the double inquiry as to profits and damages could not be maintained; and you put the Counsel for the patentee to elect which of those inquiries he would stand by. The Counsel for the patentee elected to stand by the inquiry as to damages, and to relinquish the inquiry as to profits; and, accordingly, the decision embodied in your Lordships' Order was, that the decree should be varied by striking out the inquiry as to profits; and in other respects your Lordships affirmed the decision of the Court below (2).

Now, my Lords, as I understand that Order, if it decided anything it decided this, that, not by reason of any peculiarity in that particular case, not by reason of the inquiry as to damages being sufficient for that particular case as distinguished from other cases, but on the general principle that the recent power given to the Court of Chancery to grant an inquiry as to damages (3) was not intended to be superadded to, and could not co-exist with, the old relief administered by the Court of Chancery of granting an inquiry as to profits; upon that ground your Lordships decided that the decree in that case should be varied; and, my Lords, that is a ground which applies not to that case alone, but to every case of an infringement of a patent.

My Lords, in that state of things, the appeal of Messrs. *De Vitre*

(1) 8 Jur. (N.S.) 525, 531; 31 L. J. (Ch.) 457–466; 4 De G. F. & J. 288. The words of the judgment on this part of the subject are not the same in all the reports.

(2) Law Rep. 5 H. L. 1.

(3) 21 & 22 Vict. c. 27, ss. 2–5.

1873
DE VITRE
v.
BETTS.

having been instituted against the whole of the decree which had been made against them, their solicitors entered into communication with Mr. *Betts*, the patentee, or his solicitors, and they stated in substance that after the decision in your Lordships' House upon the validity of the patent, it would be impossible to them to continue, and they did not intend to continue an appeal raising the question of the validity of the patent; but that, on the other hand, as they were bound to submit to the decision of this House as to the validity of this patent, so they should also have the benefit of the decision of this House against the duplicate inquiry; and they made what I must say was a very fair and proper proposal to the solicitors for the patentee—that they would abandon their appeal and pay the costs up to that time; and they proposed that in like manner Mr. *Betts* should relinquish whichever of the two inquiries he did not intend to stand by, and stated that if he did not agree to that proposal they would make use of the correspondence at the hearing of this cause with a view to fix the Respondent with the subsequent costs of the appeal. My Lords, I think that was an extremely fair proposal. I must say that Mr. *Betts* was bound to take notice of what had been done in the other case, which was a case of his own, and he was bound to know that what had been decided in the other case must apply equally to the case now before your Lordships. He thought proper to refuse the offer and to continue the appeal. I must say I think that was a vexatious proceeding, which has led to an unnecessary and vexatious contracting of costs.

Now, my Lords, as to the variation of the decree; that follows as a matter of course from what your Lordships have already heard and what I have said. The decree must be varied in the way it was varied in the case of *Neilson* v. *Betts*. The only other question is, what is to be done with regard to the costs incurred by the refusal of the offer to which I have referred. My Lords, the general rule on which your Lordships have acted is this: When an Appellant succeeds in an appeal against an order of the Court below, your Lordships have not been in the habit of making the Respondent pay the costs of the appeal, for this reason, that you have not thought it right to fix the Respondent with costs which have been occasioned, not by him or by his act, but by what has been termed the miscarriage of the Court below. He has a right

under ordinary circumstances to maintain the decree below until it has been declared by the highest Court of Appeal that that decree cannot be maintained. My Lords, another Court of ultimate appeal—the Judicial Committee of the Privy Council—proceeds on a different rule, and it is the habit there to give the successful party, as a general rule, the costs of the appeal. I own I think that the better rule; but I certainly should be the last to advise your Lordships, in one particular case, and for the purpose of one particular case, to depart from that which has been the established rule of the House. The question here is altogether a different one; it is not whether the Respondent is to pay for the miscarriage of the Court below, but whether the Respondent is to pay the costs which have been occasioned by his own conduct, and which are altogether unnecessary, and altogether independent of any controversy as to what has been done in the Court below. If I am right in the observations I have made, it was brought home to the mind of the Respondent that after the decision in *Neilson* v. *Betts* (1) there was no longer anything to be argued in this case, or anything which your Lordships could attend to or listen to for a moment. The offer was then fairly made to reimburse all expense he had incurred up to that time, and from that time forward it became, I repeat, not a question of what the Court below had done, but a question of misconduct on his part in maintaining the defence to an appeal which, when it was narrowed to this one single point, he no longer ought to have maintained. My Lords, on this ground, which stands high and dry from the infringement of any rule of your Lordships' House, I entirely concur in the motion made by my noble and learned friend, that in this case, according to the offer made by the Appellants, they should pay the costs of the appeal up to the 26th of January, 1872, and from that date the costs of the appeal should be ordered to be borne by the Respondent.

Decree appealed from varied, with special directions as to costs.

Lords' Journals, 10th June, 1873.

Solicitors for the Appellant: *Freshfields.*
Solicitors for the Respondent: *Robinson, Son, & Edmonds.*

(1) Law Rep. 5 H. L. 1.

1873
June 12.

ALFRED A. JAMES, Official Liquidator of THE INTERNATIONAL CONTRACT COMPANY, LIMITED . . . . . } Appellant;

AND

JAMES A. MAY and The Liquidators of the WEST LONDON, &c., WHARVES COMPANY, LIMITED . . . . . } Respondents.

Company—Nominal Shareholder—Trustee—Indemnity—Voluntary Winding-up.

M. consented, at the request of the secretary of the *C. Company*, to become the purchaser of shares in the *W. Company*. The shares were purchased by him for the *C. Company*, from which he received £15 for himself. He never paid anything for these shares, the money being paid by the *C. Company* on whose behalf he had purchased them. *M.* executed transfers of the shares to the *C. Company* (at the written desire of the secretary of that company), and took no farther trouble in the matter. The *C. Company* was ordered to be wound up. The *W. Company* was wound up voluntarily, under the direction of the Court. There were pecuniary transactions between the two companies. The *W. Company* made a call on *M.* in respect of his shares. The shares were declared forfeited for non-payment of calls. *M.* afterwards explained all that had been done, and the *W.* directors, in consideration of his transferring to them all his rights and interests in the shares, released him from all liability to them. *M.* took out a summons for the purpose of compelling the *C. Company* to indemnify him against any demands that might be made on him by, or on account of, the *W. Company*:—

Held, that this was a mere case of trustee and *cestui que trust*, and that *M.* was entitled to the indemnity.

Where a company is being voluntarily wound up under the authority of the Court, the liquidators cannot recognise the release of one of its contributories, declared by a deed of the directors, without first obtaining the sanction of the Court.

A COMPANY called the *Contract Company* was registered in the month of April, 1864. The *West London Wharves Company* was constituted under the authority of certain Acts of Parliament, passed in 1863–4–5. The directors of the two companies entered into negotiations with each other. These negotiations will be more fully detailed in the next case. Here it is sufficient to mention that the *Contract Company*, known in all the proceedings under the name of "the Contractors," became possessed of a large

1873
JAMES
v.
MAY.

number of shares in the *Wharves Company*. On the 9th of July, 1866, the *Contract Company* was ordered to be wound up. On the 4th of June, 1867, the *Wharves Company* passed a resolution for a voluntary winding-up, and on the 15th of June the Master of the Rolls made an order that the winding-up should be continued subject to the supervision of the Court. On the winding-up of the two companies, the liquidators of the *Wharves Company* claimed a considerable sum against the liquidators of the Contractors' company on account of these shares. The Contractors denied their liability, on the ground that these shares belonged to one *James Alexander May*. That person had taken out a summons on the 27th of July, 1870, against the Contractors, and their official liquidator, asking that the Contractors might be ordered to give him an indemnity in respect of 4978 shares held by him in the *Wharves Company* as the nominee or trustee of the Contractors, and that he might be entitled to rank as a creditor of that company for the sum of £30,722 12*s*. 7*d*., being the amount of calls, with interest, and for consequent relief, and costs.

May (who described himself as of 14, *Water Street, Whitefriars*), made an affidavit, dated the 15th of July, 1870, in which he said that he was the registered proprietor in the books of the *West London Wharves and Warehouses Company, Limited*, of 4978 shares in the said company. A claim had been made upon him in respect of calls and interest, to the amount of £30,722 12*s*. 7*d*. He had no interest in these shares, and never paid any consideration for them—they were the shares of the *Contract Company, Limited*, were paid for by that company, and were placed in his name as a trustee and nominee for the *Contract Company*. At the time the shares were placed in his name he executed and handed to the *Contract Company* transfers of the said shares, and it was agreed and understood between him and the said company that the shares were the property of the company, which would pay the calls and meet all the liabilities in respect of them, and that he was to be indemnified from all liability in respect of the same, and from all costs, charges, and expenses of and incidental thereto.

In a deposition made before a Special Examiner in Chancery, in August, 1870, *May* gave the following account of the transaction, from the effects of which he now sought to be relieved. He stated

1873
JAMES
v.
MAY.

that he was now blind, but he had formerly been clerk to a Mr. *John Gurney*, a solicitor. He executed about four years before that time a document. [It was put in evidence, as hereinafter mentioned.] Mr. *Gurney* gave him about £10 for executiug it. He did so, and received the money. He was ill at this time, and wanted to go out of town, but had not the means to do so. After Mr. *Gurney* gave him the money, he went out of town. The document was read over to him immediately before he executed it; he had not before been told anything about it; he never paid anything upon it; he had had many calls for money on it, and notices of meetings of the company to which it related, but he had not attended to either; he did not look upon himself as having any right or power in the matter. Shares in the *Wharves Company* were placed in his name about 1866. He handed the transfers of these shares to Mr. *Wilkins*, the transfer clerk of the *Contract Company*. The agreement and understanding that these shares were to be the property of that company, which would meet all liabilities on them, were made and arrived at with Mr. *Wilkins*, when he came to *May*, and asked leave to put the shares in *May's* name. At that time *May* executed transfers of them to the *Contract Company*. The agreement that *May* should be indemnified from all liability was inferred by him from what *Wilkins* said on the same occasion. He never had received any indemnity, written or otherwise, from the *Contract Company*, or any officer of it. He received a cheque for £15 from Mr. *Hopley*, the secretary, for his trouble. He received a memorandum from *Hopley* to go to *Broad Street*, and accept a transfer of shares in the *Wharves Company* into his (*May's*) name, and bring the transfer back to *Hopley*. In the course of his cross-examination he said that when he was first asked to have the shares in the *Wharves Company* put into his name, *Wilkins* asked to have that done as a mere matter of form, and to re-transfer them in blank, and he would take them back again. *May* said he expected to be paid, and *Wilkins* assented to this, as he also did on other occasions. He knew that taking shares involved liability, but he considered he was indemnified as to these shares, because they were immediately re-transferred by him, and he did not consider that he held them at all; he had no property in them; they belonged to the directors

of the *Contract Company;* he never received any certificates of them. He was a mere "dummy" in the matter. He had done the same thing on other occasions at Mr. *Wilkins's* desire. *Wilkins* filled in his name and description, as he (*May*) was getting blind. He was seventy-four years of age.

There was a paper (undated) put in, as part of the evidence: it was in these terms: "Mr. *Hopley* would be glad if Mr. *May* would go on to Messrs. *Pater & Co.*, 75 *Old Broad Street*, to sign a transfer for thirty shares, *West London Wharves Company*, and *bring the same away with him*, for Mr. *H.*" Mr. *Hopley* in his deposition admitted writing this paper, in his official position as secretary of the company.

These 4978 shares were, on the 2nd of May, 1867, declared to be forfeited for non-payment of calls by *J. A. May.* The calls at that time amounted to £24,890.

There was an indenture of the 6th of August, 1869, between *May* and the *Wharves* directors, which recited that he was settled on the list of contributories of the *Wharves Company* in respect of these shares; that he alleged they were held by him as a trustee and nominee for the Contractors; and that he was entitled to be indemnified by that company. In consideration thereof the *Wharves* directors agreed to forego process against him personally, and he thereby assigned to them all his interest in the shares.

On the 6th of December, 1870, the summons was heard before the Vice-Chancellor *Stuart* at Chambers, when His Honour refused to make any order thereon, upon the ground that he did not think that any trust had been proved. This refusal was afterwards (the 15th of December, 1870) confirmed in Court. An appeal was presented to the Lords Justices, who, thinking it a simple case of trust and indemnity, by an order of the 31st of January, 1871, discharged the order of the Vice-Chancellor, and granted the prayer of the summons.

This appeal was then brought.

Sir *J. Karslake*, Q.C., and Mr. *Hardy*, Q.C. (Mr. *Macnaghten* was with them), for the Appellants:—

There is no deed to indemnify produced; and the mere statements of the conversations and the supposed understandings

1873
JAMES
v.
MAY.

between *May* and the officers of the company cannot be sufficient to fix the *Contract Company* with the liability now sought to be charged upon it. It is clear that *May* became liable to the *Wharves Company* for a consideration paid to him by the *Contract Company*, and he has no substantial claim to an indemnity.

Here, if *May* was liable to the *Wharves Company*, the directors of that company, in the exercise of their undoubted authority, have by the deed of the 6th of August, 1869, released him, and having done so, he cannot ask for an indemnity against a liability from which he has been released. He was primarily liable, for the shares were taken in his name, but that liability is at an end. This is really a device to defeat the terms, the spirit, and the intention of the Act of 1862; for that Act confines liability to persons whose names are entered on the register, and declares that no notice of a trust shall be entered on the register. Yet without any change in the register, and notwithstanding the entry of his own name in that register, *May* now claims to be released from liability on the ground that he is a mere trustee. [LORD CHELMSFORD:—But can the release be looked at here? The Appellant is the liquidator of the company. How can liquidators, of their own authority, adopt a deed like that of 1869, and release a person from his legal liability? They must first ask for the sanction of the Court. This is a voluntary liquidation, made under the authority of the Court, and nothing can be done but by its authority.] The indenture has been acted on from the first; and here *May* comes forward, not from being subject to any injury, but from the fear that he may be made subject to some. [LORD CHELMSFORD:—And to prevent that is a fundamental principle of Equity.] The right to indemnity is a right, not an actual thing. Can *May* sell the right? He has sold it here to the *Wharves Company*. By the sale his title to indemnity, if he ever had any, is gone—and the *Wharves Company* can have no right to claim an indemnity against a liability which that company alone can ask to enforce. *Maitland's Case* (1) will be relied on by the other side, but it does not govern the present. There *Maitland* had been called on to pay a specific sum of money, and the Court thought the company for which he held the shares was liable to

(1) *Nom. In re National Financial Company*, Law Rep. 3 Ch. Ap. 791.

answer that call. Here the company that might have made the call has released *May*.

The *Solicitor-General* (Sir *G. Jessel*, Q.C.), Mr. *Dickinson*, Q.C., and Mr. *Horton Smith*, were for the Respondents, but were not called on to address the House.

LORD CHELMSFORD :—

My Lords, I submit to your Lordships that there is nothing in this case now that the deed is taken away, on which alone it was contended, on the part of the Appellant, that *May*, if he had any right originally to call for an indemnity, had parted with that right. There can be no doubt whatever that *May* was a trustee for the *International Contract Company* in respect of these shares. The notion of his having been paid the sum of £15 (or whatever the sum was) for undertaking the risk has not the slightest foundation. It appears that *May*, being a needy man, was desirous of making money if he could, and having these shares purchased in his name, he says that he was desirous of receiving something for his trouble, and that he received £15. There can be no doubt that, by a very well-known principle of Equity, he was entitled to be indemnified by his *cestui que trust* against any liability that might arise out of the transaction; and it is admitted that that would be the case but for this deed, which it is said released the company from the liability when it relieved him from the obligation of paying in respect of the shares of which he was trustee, and that, therefore, he has no right whatever to claim any indemnity, because there was nothing to be indemnified against. The *Wharves Company* directors had no right to execute this deed. Their company was under voluntary liquidation, and an order was made by the Master of the Rolls that the winding-up should continue under direction of the Court; and the directors had no power, under the circumstances, to release from debts without the sanction of the Court; and it does not appear that any sanction had been given by the Court to that deed, even supposing it to have been formally executed by the company. This is the ordinary case of a trustee being indemnified by his *cestui que trust*, and the fact of the *Wharves Company* being joined with him, for its own benefit, is perfectly immaterial.

1873
JAMES
v.
MAY.

I therefore think the order of the Lords Justices is perfectly correct in declaring that *May* is entitled to this indemnity; and I submit to your Lordships that their order ought to be affirmed.

LORD COLONSAY:—

My Lords, I have nothing to add. The case is a very short one and it is quite clear.

LORD CAIRNS:—

My Lords, I think it better not to express any opinion which I might be inclined to form after full argument, on what the effect of that deed might be supposing the deed established and proved to be a valid deed. It appears now the deed has no validity. It may, therefore, be removed out of the case altogether; and being removed, there is nothing in the case but the ordinary right of a trustee to be indemnified by his *cestui que trust* from liability. I see nothing done by *May* (putting the deed out of the case) to deprive him of that right; and beyond all doubt, in the origin of the case, he was a trustee of the shares for the company.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 12th June, 1873.

Solicitors for the Appellants: *Lewis, Munns, & Longden.*
Solicitors for the Respondents: *Tilleard, Godden, & Home.*

ALFRED A. JAMES, Special Liquidator of THE INTERNATIONAL CONTRACT COMPANY, LIMITED . . . . . } Appellant;

1873
June 12, 13.

AND

WILLIAM EVE and Others, Official Liquidators of The WEST LONDON WHARVES and WAREHOUSES COMPANY, LIMITED . . . . . } Respondents.

Companies—Illegal Appointment of Directors—Commission.

There were two companies, *C.* and *W.*, the directors of each of which entered into business arrangements with the other. The *W. Company* had six directors. A deed was executed in February, 1865, by the 6th clause of which the *W.* directors agreed that three of the *C.* directors should at once become members of the *W.* board; that on certain events happening a fourth director of the *W.* board was to be appointed by the *C.* directors; and that then there should be no farther appointment of *W.* directors except with the sanction of the *C.* directors:—

Held, that this was illegal; that the stipulation affected the whole of the rest of the deed, and made it illegal and void.

By other arrangements in the same deed the *C.* directors undertook to do such works as the *W.* directors might appoint; to provide materials, to "place" the shares of the *W. Company*, and all the paid-up calls of the *W. Company* were to be paid to the *C. Company*, which was to make all necessary payments for the *W. Company*, (acting as its banker) to pay, for two years, 7 per cent. on the capital paid up by its shareholders, to render accounts of works done, and to receive 35 per cent. on all moneys received and paid on account of the *W. Company*:—

Held, that the payment of the 7 per cent., and that of the 35 per cent., were both illegal.

The deed of February, 1865, was declared by another deed in May, 1866, to be cancelled, except so far as anything had been done under the former:—

Held, that as nothing was shewn to have been done under the deed of February, 1865, except by some payments of the 7 per cent. interest on the calls paid up, and by the receipt and payment of moneys, as to which the *C.* directors had really acted only in the character of bankers to the *W. Company*, there was no claim for the agreed commission.

THIS was an appeal against an order of Lord Justice *James* made on the 22nd of July, 1870, discharging a previous order made by Vice-Chancellor *Stuart*. The Vice-Chancellor's order, founded on his Chief Clerk's certificate, had allowed in favour of

1873
JAMES
v.
EVE.

the *Contract Company* a sum of £20,670 4*s.* 9*d.* by way of deduction from a claim made on the *Contract Company* by the *West London Wharves Company.*

The *Contract Company* (known in these proceedings as "the Contractors") was duly registered in April, 1864, under the "*Companies Act*, 1862." Among the objects for which the company was established were these: to take contracts for public works, to assist in the formation of companies for the execution of works, to provide and deposit caution moneys, to guaranty interest on capital, to negotiate the raising of capital and all incidental matters relating thereto, to transact the business of a capitalist, builder, or contractor, and generally to do all other things conducive to the attainment of these objects.

Another company, called "*The West London Docks and Warehouses Company, Limited,*" was incorporated by an Act of 1864 (26 & 27 Vict. c. ccxxviii.), which Act was altered and amended by other Acts in 1865 and 1866, and finally came to be known by the name of the *Wharves Company.* These Acts in the usual manner incorporated the *Companies Acts* and provided for the election of directors in the ordinary way.

On the 3rd of February, 1865, an indenture was executed between the two sets of directors by which the Contractors undertook (clause 1) to construct such docks and other works as might be directed by the Board of the *Wharves Company*, provide materials, and "place" the necessary capital, £500,000, which sum was to be at the entire disposition of the *Wharves Company*, and to pay interest for two years at the rate of 7 per cent. on the capital paid up, from the date of the indenture, or such farther period as might be agreed on, in consideration of a commission of 35 per cent. being paid by the *Wharves Company* to the Contractors on the amount of the capital of the *Wharves Company*, in manner thereinafter mentioned.

Post 341

An account (clause 2) was to be rendered every month, of the moneys paid by the Contractors, by the direction and on account of the *Wharves Company*, which was to pay to the Contractors the amount of such account, together with the said sum of £35 per cent thereon.

Clause 3: All moneys received by the *Wharves Company*,

whether by way of calls on shares, or debentures, or otherwise, were to be paid to the Contractors (who for the purposes of this indenture were to be the bankers of the *Wharves Company*), and no payment was to be made by the *Wharves Company* in respect of the moneys aforesaid except through the medium of the Contractors.

Clause 5: The *Wharves* directors were to deposit and to keep deposited with the Contractors, until £400,000 had been expended, shares or stocks of the company of the nominal value of not less than £60,000 beyond the advances made by the Contractors on account of the *Wharves Company*.

Clause 6: The Contractors were to have the right of appointing three directors of the *Wharves Company*; and in the event of a bill, then being promoted in Parliament by the *Wharves* directors, being passed, the Contractors were to have the privilege of nominating another director; and no farther directors of the *Wharves Company* were to be appointed without the sanction of the Contractors.

By an indenture of the 1st of May, 1866, it was agreed that the indenture of the 3rd of February, 1865, should be cancelled, and, except so far as the same had been already acted on, should not be deemed binding on either party.

An agreement of the 3rd of May, 1866, was then executed between the two sets of directors. The Contractors thereby covenanted with the *Wharves Company* to complete certain works therein mentioned, and it having been represented to the Contractors that the payment of interest during the construction of the works would facilitate the issue of the shares of the *Wharves Company*, and thereby enable the directors the better to meet their liabilities to the Contractors, and so secure the more speedy completion of the works, the Contractors had accordingly agreed with the *Wharves Company* to take upon themselves the payment of interest to the shareholders of the *Wharves Company* at the rate and at the times thereinafter mentioned. The Contractors thereupon covenanted that they would, for a period of two years from the 31st of March, 1866, pay to the shareholders of the *Wharves Company* interest half-yearly, on the 30th of September and the 31st of March, at and after the rate of 7 per cent. per annum

1873
JAMES
v.
EVE.

upon the amount from time to time paid up on their respective shares, the first of such half-yearly payments to commence on the 30th of September then next.

By an indenture of May, 1866 (left blank as to the day), made between the Contractors and the Wharves directors, arrangements were made as to certain works to be executed by the former for the latter, and security was covenanted to be given for payment. This indenture was not, however, carried into effect.

As to the placing of shares, the Contractors alleged that, in pursuance of the indenture of February, 1865, they placed shares for the *Wharves Company* to the extent of £500,000, and acted as the bankers of the company, and paid interest for two years on the paid-up capital at the stipulated rate. The first two of these allegations were denied by the *Wharves Company*; the third was only admitted in part.

On the 9th of July, 1866, the *Contract Company* was, on the petition of a creditor, ordered to be wound up. The Appellant was appointed the sole official liquidator.

On the 4th of June, 1867, the *Wharves Company* passed a resolution for the voluntary winding-up of the company, and on the 15th of June the Master of the Rolls ordered such winding-up to be continued subject to the supervision of the Court. The Respondents were appointed liquidators.

On the 1st of November, 1869, the Respondents gave notice to the Appellant that they claimed, on the part of the *Wharves Company*, to be the creditors of the Contractors for a balance of £29,244 7*s.* 3*d.* with interest. The Chief Clerk certified that on a proper balance of accounts the sum of £4766 16*s.* 3*d.* alone remained due to the *Wharves Company*. In arriving at this result he had allowed a sum of £19,780 1*s.* 3*d.* for commission, at the rate of 35 per cent., according to the 6th article of the indenture of the 3rd of February, 1865, together with a sum of £890 3*s.* 6*d.*, making together £20,670 4*s.* 9*d.*, which he declared the Contractors entitled to deduct from the claim made against them by the *Wharves Company*. A motion was made before Vice-Chancellor *Stuart* to disallow this certificate, but His Honour refused the motion and confirmed the certificate. Upon appeal to the Lords Justices the case was heard by Lord Justice *James*, who, on the

22nd of July, 1870, discharged the order of the Vice-Chancellor and disallowed the deduction of £20,670 4*s.* 9*d.*

This decision was now brought up by appeal.

Sir *J. Karslake*, Q.C., and Mr. *Hardy*, Q.C. (Mr. *Macnaghten* was with them), for the Appellant:—

The point on which this case was disposed of in the Lords Justices' Court had never been raised in the Vice-Chancellor's Court. It was, that the agreement to allow certain directors of the *Wharves Company* to be nominated by the Contractors, was illegal. The other point, that the agreement to pay 35 per cent. was illegal, had been discussed in the Vice-Chancellor's Court; but His Honour thought that, as that was a matter of settlement between two sets of directors, who had full power to bind their respective companies, and as the law did not now interfere with the amount of interest which a man agreed to pay, the transaction could not be set aside. The stipulation as to the appointment of directors was, however, treated by the Lord Justices as not only invalid in itself, but as an illegality that overran and affected the whole transactions between the companies. That was an error. The two stipulations were independent of each other. The agreement as to the 35 per cent., which was perhaps expressed in doubtful terms, was nevertheless one which had a good and valid consideration. The directors of the *Contract Company* undertook to do works, to place shares, and to disburse moneys; and these things sufficiently accounted for the apparently large commission they were to receive. A stipulation which in itself was legal, and for which a real consideration was given by the *Contract Company*, could not be rendered invalid by another stipulation in the same deed, with which it had no necessary connection. But it is submitted that there was not anything illegal in the agreement as to the appointment of directors. The *Contract Company* had a considerable interest in the *Wharves Company*—held a large number of shares in it, and was entitled to all the rights which the possession of those shares could give. That itself formed what the law deemed a consideration for the bargain. The 35 per cent. was not to be paid till the Contractors had performed the various conditions on which that payment was to become due, and these they have performed.

1873
JAMES
v.
EVE.

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Dickinson*, Q.C. (Mr. *Horton Smith* was with them), for the Respondents:—

The Contractors here undertook to construct the works, to place the shares, and to pay 7 per cent. interest on the capital paid up for two years. As to the first and second, there was a total failure—they did nothing of the sort; as to the last, they did pay to a certain small extent, so that there was not a total failure of their undertaking. But that was nothing; for the only thing they did was something which the 29th section of the *Wharves Act*, 1865, prohibits (1). They paid interest out of the capital—that capital which was created by the amounts paid up on the calls. Now that was by the Act forbidden, and being forbidden to be done by the company itself, it could not be done indirectly through arrangements made with another company. Yet here that was attempted to be done, at the cost of the *Wharves Company* paying back to the Contractors a still larger sum than the latter had paid. That was clearly *ultrà vires*.

The arrangement as to the directors was also clearly *ultrà vires* and bad. The directors of the two companies had made an arrangement between themselves which was altogether unwarranted. It was an instance of greater and more illegal assumption of power than was exhibited in the *London and Northern Insurance Corporation (Stace and Worth's Case)* (2).

Mr. *Hardy*, in reply, insisted that if any objection existed to the deed of February, 1865, it was removed by the deed of May 1866, by which the validity of the transactions of the two companies must now be determined.

LORD CHELMSFORD:—

My Lords, the question upon this appeal is, whether the Chief Clerk's certificate as to the amount due to the *Wharves Company* from the *International Contract Company*, arrived at by allowing

(1) Sect. 29: "The company, or any other company to which this Act relates, shall not, out of any money, by this Act, or any other Act relating to the respective company authorized to be raised by shares, or by borrowing, pay interest or dividend to any shareholder on the amount of calls made in respect of the shares held by him."

(2) Law Rep. 4 Ch. Ap. 682.

to the *Contract Company* a deduction from the claim of the *Wharves Company* of a commission at the rate of 35 per cent. with interest, amounting to £20,670 4*s.* 9*d.*, ought to be varied.

This question depends upon the construction and the validity of an agreement entered into between the two companies on the 3rd of February, 1865:—[His Lordship read the material clauses of that agreement, see *ante*, p. 336.] The Vice-Chancellor was of opinion that under the contract the sum of 35 per cent. was payable upon all cheques which were paid by the Contractors out of the funds in their hands belonging to the Wharves directors; because he said that the question of the reasonableness or unreasonableness of this commission was immaterial, inasmuch as it was a positive agreement between the parties. Upon appeal Lord Justice *James*, upon a point which had not been raised before the Vice-Chancellor, namely, upon the effect of the 6th clause in this agreement of the 3rd of February, 1865, was of opinion that that clause stipulating for the appointment of directors in the *Wharves Company* by the Contractors was *ultrà vires* and illegal; and that the stipulation, in fact, affected the whole of the deed, and therefore rendered it void. Upon the question with regard to the 35 per cent. being payable in respect of the cheques, which were honoured, in fact, by the Contractors as the bankers of the *Wharves Company*, Lord Justice *James* was of opinion that it was a most unreasonable construction of the contract to suppose that the bankers were to receive a commission of 35 per cent. for paying the cheques of their customers, and he thought the true construction of the contract was this: there being works to be performed under the contract by the Contractors, they were to render monthly accounts to the Wharves directors of what had been so paid by them in the course of the month, and that then the Wharves directors were to repay to the Contractors, or that the Contractors were to pay themselves out of the funds in their hands (which is the same thing), the amount of such accounts, together with the 35 per cent. and the interest thereon.

The question which your Lordships have first of all to consider is, What is the proper construction of this contract? It appears to me that the contract amounts to this. The Contractors agree that they are to construct docks and warehouses, and to do other

1873
JAMES
v.
EVE.

works under the direction of the board of the *Wharves Company*. The Wharves directors agree that they will place in the hands of the Contractors funds arising out of the calls which have been paid to them, and their debentures; and then, contemplating that works would be in progress upon which the Contractors would have to make payments from time to time, they stipulate that monthly accounts shall be rendered of what of has been, in fact, expended during that time, and then the Wharves directors are to pay to the Contractors the amount of such accounts, together with the sum of 35 per cent. thereon. That renders the agreement a reasonable one. I agree with Lord Justice *James*, that it is most unreasonable, if you construe it as meaning that the Contractors are to receive, in respect of payments which are made to the account of the Wharves directors out of their own moneys, a commission of 35 per cent. But whether reasonable or not, the question arises whether, in consequence of certain stipulations in that contract, it is not rendered invalid and void. In the first place, with regard to the stipulation as to the appointment by the Contractors of directors of the *Wharves Company*, that stipulation being that the Contractors shall have the right to appoint three directors to the board of the *Wharves Company*, and then, if a bill passes, giving the latter power to enlarge their capital, the Contractors shall have the privilege of nominating another director, and that no farther directors shall be appointed in the *Wharves Company* without the sanction of the Contractors, the question is, whether the Lord Justice was not correct in saying that that stipulation was an illegal one, that it was *ultrà vires*, and that it rendered the agreement altogether void.

Now, there can be no doubt that under the *Companies Clauses Act* directors can only be appointed at a general meeting by the shareholders. This stipulation in the deed takes from the Wharves shareholders the power of appointing their directors, and appoints those who in fact are the Contractors for the works, and makes them directors of the works, because the works to be done are such works as may be directed by the directors of the *Wharves Company*. Therefore it may happen that at a meeting of the directors of the *Wharves Company* the directors appointed by the *Contract Company*—that is to say, by the Contractors themselves—may

constitute a majority, and they may direct and control entirely those works which they have contracted to undertake. Now, the way in which this clause has been acted upon has been this: there were six directors of the *Wharves Company* at the time when this agreement was made. Mr. *Kitson*, who was the chairman of the *Contract Company*, was appointed one of the directors of the *Wharves Company*, and afterwards appointed the chairman of that company, and two other directors of the *Contract Company* were appointed in the room of two of the directors of the *Wharves Company* who had resigned. The effect of that arrangement certainly was not only to leave the three *Contract Company* directors in a majority of one upon the board of the *Wharves Company*, but at the same time to place them in a situation in which they might have absolute control over the works which were to be done according to the contract.

It appears to me that the Lord Justice was perfectly correct in saying that this is clearly illegal, and, except in the very able argument of Mr. *Hardy* to-day, it scarcely was resisted that this was illegal. But farther, it appears to me (and in that respect I agree entirely with Lord Justice *James*) that the illegality runs through the whole of the contract, because the payments are to be made in respect of works, those works are to be ordered by the directors, these directors are persons illegally nominated, and therefore it is impossible to confine the question entirely to the mere point arising upon the 6th clause, but the illegality of the appointment of the directors extends itself over the whole of the agreement.

But then it is said that that clause may be regarded as an independent one, that the question will be as to whether there is any illegality in the first clause of this agreement, and that, if there is none, the mere stipulation with regard to the appointment of directors improperly and illegally will have no effect. I will not stop to consider whether that clause can be regarded as independent of all the rest of the deed, but I will take it for the moment that it has been rejected, and that we are to construe the contract without reference to that clause. I think there is a very strong objection arising out of the first clause as to the stipulation of 35 per cent. to be paid as commission. The 29th clause of the *West London Wharves and Warehouses Act*, 1865, which has been re-

1873
JAMES
v.
EVE.

ferred to, enacts that "the company" "shall not out of any money by this Act" "authorized to be raised, by shares or by borrowing, pay interest or dividend to any shareholder on the amount of calls made in respect of the shares held by him." Now, it is clear by the general Acts that the company had no power to issue shares at a discount. The question whether this arrangement with the *Contract Company* as to the 35 per cent. amounts to an issuing of shares at a discount, I do not think it at all necessary to consider. There may be, perhaps, some little doubt upon the subject, but it seems to me to be perfectly clear that the stipulation as to the payment of 7 per cent. to the shareholders, as is in fact admitted by the Contractors themselves in the claim they have sent in, comes within this clause, which prohibits them from paying interest or dividend to any shareholder on the amount of calls made in respect of the shares held by him. Now, it was admitted very fairly and properly by Mr. *Hardy* that the Wharves directors could not pay directly to the shareholders this 7 per cent. It is quite clear that if it cannot be done directly it cannot be done indirectly, and I think there can be no doubt whatever that the payment of 7 per cent. to the shareholders, arranged between the directors, is part of the agreement providing for the payment of the 35 per cent., and is in fact indirectly a payment out of the calls. The calls were to be paid to the Contractors, and therefore this payment is indirectly a payment to the shareholders out of calls. That being so, it is clear that if they could not have done it directly, they cannot in this indirect manner evade the provisions of their Act of Parliament; and therefore it appears to me that in that respect, without resorting to the 6th clause, the 1st clause, read by itself, is illegal and void.

But then it is said, that this deed of the 3rd of February, 1865, has been cancelled, with the exception of what has been already done under the former deed. As to that, the question arises, what had been done under the former deed. As far as I understand there had been money received upon the calls by the Contractors, and there had been payments made amounting to £56,000. Amongst those sums I think there was an amount of £10,000, which was advanced in respect of the *Battersea Park* contract; but then the question, and the important question is, what had been done in respect of the payment of the 35 per cent. commission,

because if anything had been done in respect of that, undoubtedly that would have been rendered valid by the cancelling deed. Now what had been done with regard to the 35 per cent. commission? I do not find that there is the slightest evidence of even any entry having been made in the books of the Contractors of a credit of that 35 per cent., much less has there been any account rendered to the *Wharves Company* of a charge of that 35 per cent. in respect of their commission.

But then, as I understand the argument, it was this: That 35 per cent. became due to the *Contract Company* upon every payment that was made, and, therefore, every payment was in fact acting upon the deed. Surely that cannot be so. That was the deed acting upon itself, it was not the Contractors acting upon the deed. If there was no charge made of 35 per cent. at any time, or under any circumstances, how can it be said that a mere payment which raised a liability in respect of that 35 per cent. was an acting upon it amounting to a claim of the 35 per cent.?

But then it has been said that the claim of the 35 per cent. never arose, because there have been no works done; and supposing the 2nd clause of the deed is applicable, and is the only applicable provision, the claim for 35 per cent. could not arise until something had been done; and there was nothing done except those payments which have been adverted to. It appears to me that that would be a complete answer to the claim of the 35 per cent. altogether, because this 35 per cent. are to be paid under the 1st clause "in manner hereinafter mentioned." Now what is the "manner hereinafter mentioned"? "That an account shall be rendered every month of the moneys paid by the said Contractors, by direction and on account of" the *Wharves Company*, and the *Wharves Company* "shall pay to the said Contractors the amount of such account, together with the said sum of 35 per cent. thereon." It is perfectly clear, therefore, that until that account has been rendered there can be no claim whatever to the 35 per cent.; and no works having been done which rendered that account necessary to be rendered, that puts an end entirely to the claim of 35 per cent.

It is perfectly clear from the terms of this contract that the

1873
JAMES
v.
EVE.

Vice-Chancellor cannot be right in saying that the 35 per cent. were to be paid in respect of the payment of cheques out of the funds of the *Wharves Company* in the hands of the Contractors, because the account which is to be rendered is not an account of moneys which have been paid, and which are not to be repaid to the Contractors; but it is an account of something which has been paid by the Contractors, which the Wharves directors are to repay, because it is provided that a monthly account is to be rendered of what has been paid, and that then the *Wharves Company* "shall pay to the Contractors the amount of such account." That clearly cannot refer to the amount of the cheques which have been paid out of funds of the *Wharves Company* in the hands of the *Contract Company.*

It is quite clear, therefore, that the order of the Lord Justice is perfectly correct; and the only remaining question is, whether the Contractors are entitled to have any claim admitted in the nature of a *quantum meruit.* I cannot understand upon what particular ground the Contractors claim an inquiry as to whether anything is due to them. In the first place, with regard to the advance, as it is called, of the £10,000 with respect to *Battersea Park,* that sum was an advance, in fact, in their character of bankers. It may be said, if you please, that it was an overdrawing by the Wharves directors of their account at their bankers. It appears that the sum of £15,000 was placed in the hands of the Contractors. Therefore there seems to me to be no claim whatever in respect of that sum.

The only other claim which has been made, is one certainly of a very extraordinary nature, which is that the Contract directors are entitled to be repaid the 7 per cent. which they paid to the shareholders of the *Wharves Company.* I think two half-yearly payments were made to or for (it is the same thing) the shareholders of the *Wharves Company* by the Contract directors. But the whole thing was perfectly illegal; they were bound, in fact, not to pay it. The contract between them and the Wharves directors was an illegal contract, and it is quite clear that they cannot claim any return of that which they have chosen to pay in respect of that illegal contract. The old principle, which is very well known, applies here. *In pari delicto potior est positio pœni-*

tentis. That is the answer to the claim of this *Contract Company* to have something in the nature of a *quantum meruit.*

Under all these circumstances, I submit to your Lordships that the order of Lord Justice *James* ought to be affirmed.

LORD COLONSAY:—

My Lords, I have very few observations indeed to make upon this case; for I go along with the views which have been stated by my noble and learned friend, which are substantially the views that were stated by Lord Justice *James.* It appears to me that the arrangements between these two bodies of directors are tainted with irregularity and illegality throughout.

I cannot at all accept the explanation of the first clause of the contract of 1865 that has been given by the counsel for the Appellant. It appears to me that there is an inconsistency in that account of it, as contrasted with clause 2 of the contract. Clause 1 provides nothing in the way of payment for the works to be done, as payment for the operations themselves, unless it is to be taken out of the 35 per cent. which the *Contract Company* was receive. That was to be 35 per cent. upon what? 35 per cent. upon the entire capital of the company. The works to be executed were works which we are told were to cost about £175,000, or £180,000, according to the second contract. But this 35 per cent., which it was stated was to be 35 per cent. upon the whole capital of the company, is in the next clause dealt with in this way: An account is to be "rendered every month of the moneys paid by the said Contractors, by direction and on account of the said *West London Docks and Warehouses Company, Limited,* and the *West London Docks and Warehouses Company, Limited,* shall pay to the said contractors the amount of such account" (that is, of the disbursements which the latter have made), "together with" what? "Together with the sum of 35 per cent. thereon;" that is, upon the disbursements. And supposing the disbursements to be running on until works to the extent of £180,000 are executed, this 35 per cent. would be 30 per cent. upon £180,000. What becomes of the rest of the 35 per cent., except in its application to that indirect system of illegality to which reference has been made? I therefore think that the first

1873
JAMES
v.
EVE.

clause of the contract, taking it as construed and explained by the second clause, does contain the seeds of illegality.

But I also think that the arrangement with regard to the permanent appointment from one Board to the other of the number of directors that is here stipulated for, is an arrangement which plainly was intended to place and to carry out the whole matter in the hands of the *Contract Company*—in other words, the Contractors themselves. I cannot understand how that could be a legal or an effectual arrangement. In short, I think that the whole arrangement is so tainted with illegality, that I cannot come to the conclusion that the order of the Lord Justice should be altered.

LORD CAIRNS:—

The claim is founded altogether upon the deed of the 3rd of February, 1865. That deed was supposed to continue in existence until the 1st of May, 1866, when it was cancelled, without, however, disturbing or undoing anything that might have been done under it, and your Lordships' attention therefore has to be directed merely to the interval between the 3rd of February, 1865, and the 1st of May, 1866.

Upon the construction of that somewhat obscurely worded deed, I am not disposed to differ from the argument which was addressed to your Lordships by Sir *John Karslake*. The construction appears to me a matter of doubt; but for the purpose of expressing the opinion I have formed I am willing to take the construction which was placed upon the deed by the Appellant, that is to say, that it having in the first instance stipulated for a commission of 35 per cent. upon the whole capital of the *Wharves Company*, to be ascertained as afterwards mentioned, the way in which that was afterwards directed to be ascertained in the deed was this—the capital of the company was taken as it passed out of the hands of, and was disbursed by, the bankers, the *International Contract Company*, and the commission of 35 per cent. was calculated at that stage. It appears to me that that is the only possible explanation by which you can reconcile the two clauses of the deed. If that is not the explanation of the deed, the deed appears to me to be entirely inconsistent in its two parts. But assuming that to be

the interpretation of the deed, and that, accordingly, the claim is now to have 35 per cent. upon the money which was disbursed by the International Contractors on account of the *Wharves Company*, it remains to be considered whether that claim, so founded upon this deed of the 3rd of February, 1865, can be sustained.

The first observation I have to make upon that deed is this. Assuming for the moment that the commission stipulated for could be validly stipulated for in the way mentioned in the deed, still the bargain made by the deed is a whole. It is an agreement to pay 35 per cent. upon the whole capital in return for the execution of the whole of the works, and for the placing of the whole of the capital of the *Wharves Company*, and for the performance of all the other services which the Contractors were to perform. Putting aside for a moment what was said by the deed of May, 1866, it appears to me that unless the whole of that service was performed no claim for the stipulated commission would arise. It is quite true that the deed of May, 1866, cancelling the former deed, provided that it should not undo anything which had been done under that deed. But that gave no new and independent right. It only gave a right to those who had already obtained any benefit, or received any payment under the deed, to keep that which they had already got. Now when we look to what was done under the first deed, beyond all doubt no payment—no settlement of account, no adjustment of commission—had taken place between February, 1865, and May, 1866. Therefore, if there had been no other difficulty in the case to be got over, it appears to me that that would be an insuperable difficulty in the way of the Contractors, namely, that they are not able to predicate here that they have performed the service which they were to perform as the condition precedent for obtaining this commission.

Then, my Lords, I turn to consider whether the deed itself is a deed which can be supported as regards its legality. It appears to me that it is utterly impossible to support the deed. I refer in the first place to the provision with regard to directors, which some of your Lordships have commented upon. It appears to me that that provision is fragrantly in violation of the whole principle upon which companies of this kind are regulated, the principle, of which it is only an instance, that we find in the clause of the *Com-*

1873
JAMES
v.
EVE.

panies Act, which says that no director of a company shall be interested in any contract made with the company. Here not only is a director to be interested, but there is a special provision inserted that shareholders and directors of the contracting company are to be put upon the Board of the *Wharves Company*, of that company with which the contract is made, constituting in that way a Board which, according to all principle, and according to all enactments, ought to be utterly independent of the Board of the other, the contracting company.

My Lords, over and above that violation of the spirit of the *Companies Act*, there appears to me to be a violation, with regard to the *Wharves Company*, of the whole of the enactment which requires that the directors of the *Wharves Company* should be chosen, as a matter of choice and selection, either by the shareholders of the *Wharves Company*, or, as regards a temporary interval, by the board of directors of that company. But, according to this deed, the shareholders in the *Wharves Company* were, with regard to three or four of the directors, to have no choice whatever, but were to accept foreign directors placed upon their Board by the directors of a company altogether at arm's length with them, and indeed in a position of antagonism to them. I think that an agreement containing that stipulation, a stipulation affecting, as it does, the whole of the arrangement with regard to the works, is one which cannot be maintained.

But I find, farther, that one of the considerations for this commission of 35 per cent. was this, that for two years, or for a longer period, the Contractors were to pay 7 per cent. upon the paid-up capital of the *Wharves Company*. That was a payment which, both from the nature of the case, and, indeed, from the documents which have been put forward by the Wharves directors, was plainly to be made either to or for the individual benefit of the shareholders of the *Wharves Company*, and was to be by the way of payment to them of 7 per cent. upon the capital paid up by them. Of course, my Lords, nothing could be more flimsy than this disguise. This was a direct stipulation by the *Wharves Company* with the Contractors, that the Contractors would pay to the shareholders of the *Wharves Company* that interest upon their shares, a payment which necessarily must be made out of capital

(for it was to be balanced by the payment of 35 per cent.), a payment to the shareholders of the *Wharves Company* which the Wharves directors could not have made directly without violating the Act of Parliament. It appears to me that that was a stipulation to do that which was directly contrary to the provisions of the Act of Parliament, and that illegality enters at once into the 35 per cent. commission, for that commission was to be the compensation for that payment.

I do not stop to consider, for it is unnecessary, whether the provision with regard to the 35 per cent. is not open also to objection upon the ground that it would indirectly result in issuing those shares at a discount. It is unnecessary to consider that matter, because there is quite sufficient to ruin the agreement for illegality without any consideration of that kind.

Upon these grounds, my Lords, it appears to me that no claim for the 35 per cent. commission can be supported under this deed.

I was anxious in the course of the argument to consider whether there might not be a right on the part of the Contract directors to some remuneration, independent of this agreement for services which they may have performed; but I have asked in vain for any service to be pointed out for which they can or ought to be remunerated. Have they executed any works? It is admitted that there were no works executed by them. Have they placed any capital? It was admitted very fairly by Mr. *Hardy* that he could not (and I do not see how, with the materials before us, he could) put his finger upon any single share which had, according to the technical phraseology, been "placed" by the Contractors. What else have they done? They have made the payment of 7 per cent. That was an illegal act for which they cannot be recompensed. What is there more? They have made disbursements to large amounts from time to time, according to the orders of the *Wharves Company*. But it is admitted that these payments were made by means of moneys of the *Wharves Company*, and out of moneys which the Contractors held as their bankers. For that, therefore, it is clear that no recompense would be allowed, if any inquiry were to be made. Interest has been allowed upon both sides of the account at 5 per cent., and that is the utmost which they could be entitled to upon that score. Therefore, my Lords, I cannot find

1873
JAMES
v.
EVE.

any ground whatever for advising your Lordships to direct an inquiry upon the footing of *quantum meruit* for the services performed by the Contract Company. It appears to me that your Lordships cannot do otherwise than dismiss this appeal with costs.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, 13th June, 1873.

Solicitors for the Appellant: *Lewis, Munns, & Longden.*
Solicitors for the Respondents: *Tilleard, Godden, & Holme.*

1873
June 17, 19.

THE CITIZENS' BANK OF LOUISIANA AND THE NEW ORLEANS CANAL AND BANKING COMPANY . . . . . } APPELLANTS;

AND

THE FIRST NATIONAL BANK OF NEW ORLEANS, H. HILBARD, AND CHARLES CHASE . . . . . } RESPONDENTS.

Bank—Bills—Representations—Appropriation of Funds.

7 H.L. 427
5 Ch.D. 790
12 Ch.D. 457
18 Ch.D. 585
57

A representation, by the drawer, that bills of exchange drawn upon *L.* will assuredly be paid, for that the drawer has previously remitted to *L.* funds to a much larger amount, in consequence of which representation *B.* purchases those bills from the drawer, does not amount to an equitable assignment by *N. O.* of the funds in the hands of *L.*, nor to a specific appropriation, out of those funds, of the amount of each of those bills.

Where, therefore, such an assurance had been given, and the funds in the hands of *L.* were larger than the amounts of the bills drawn upon him, but a bankruptcy of the drawer took place before the bills were payable, *L.* was held to be justified in refusing to pay the particular bills, and in handing over the funds to the legally appointed receiver of the bankrupt's estate, who demanded them on behalf of the general creditors of the drawer.

L. was a banker in *England*, and had dealings with *N. O.*, a banker and bill dealer in *America*. The course of business was that *N. O.* remitted funds to *L.*, and then drew bills on *L.* and sold those bills in *America* to persons who wished in that way to make payments in *England*. *N. O.* had represented to intending purchasers of these bills that they would certainly

be paid, for that "the bills were drawn expressly [or "specially"] against funds to a much larger amount already remitted to *L.*;" and on the faith of this assurance they were purchased:—

Held, that this did not amount to a contract entitling the purchaser of any one of the bills to a specific portion of the funds in the hands of *L.*

The application of the rule in *Jorden* v. *Money* (1) as to the distinction between representations of intention and of fact, approved.

IN the year 1867 the "*First National Bank of New Orleans*" and the "*Bank of Liverpool*" had dealings with each other. The *Liverpool Bank* was represented by *J. H. Simpson*, its registered public officer. The dealings were of this sort: the *New Orleans Bank* remitted to the *Liverpool Bank* money and good bills, and drew bills against those remittances. The *Liverpool Bank* accepted the bills thus drawn, and paid them out of the remittances. There was an understanding that the *Liverpool Bank* was never to be under cash advances, and this understanding had been duly acted on. The business of the *New Orleans Bank* consisted largely of the discount and the sale of bills of exchange.

In April, 1867, *Thomson & Co.*, of *New Orleans*, wanting a remittance to *England*, and understanding what was the course of business between the two banks, purchased from the *New Orleans Bank* a bill for £2000 drawn by that bank on the *Liverpool Bank*. It was dated the 25th of April, 1867, and was payable, at sixty days' sight, to the order of *Thomson & Co.*

On the 24th of April, 1867, the "*Citizens' Bank of Louisiana*" purchased, in the same manner, from the *New Orleans Bank*, a bill for £5000 drawn by that bank on the *Liverpool Bank*, payable at sixty days' sight. Another bill for £5000, drawn in like manner, was purchased by the *Louisiana Bank* from the *New Orleans Bank*. There was a transaction of a similar nature with the "*New Orleans Canal and Banking Company*," which had purchased a bill for £3000.

On the 13th of May, 1867, the *New Orleans Bank* suspended payment. Notice of this suspension was transmitted by telegraph to the *Bank of Liverpool*. At that time there were in the possession of the *Bank of Liverpool*, or came into its possession in due course, ample funds to meet all the bills drawn upon it by the *New Orleans Bank*.

(1) 5 H. L. C. 185.

1873

CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS.

On the 20th of May, 1867, Mr. *Charles Case* was duly appointed, under the law of the *United States*, receiver of the assets of the *New Orleans Bank*. Notice of these facts was transmitted to the *Bank of Liverpool*, and the assets of the *New Orleans Bank* were formally required to be handed over to him for distribution among the general creditors.

When the bills above-mentioned were presented to the *Bank of Liverpool* they were refused acceptance, and upon being subsequently presented for payment at the proper time, were refused payment, on the ground that none of the funds of the *New Orleans Bank*, which had come into the possession of the *Bank of Liverpool* had been specifically appropriated to the payment of any one of these bills, and therefore, as there was a receiver of the assets for the benefit of the general creditors, all such funds must be paid over to him.

Messrs. *Thomson & Co.* filed a bill against Mr. *Simpson*, as the public officer of the *Bank of Liverpool*, praying to have it declared that they were entitled to have the funds, so placed with the *Bank of Liverpool* by the *New Orleans Bank*, paid to them on the bills they had purchased; alleging that such funds had been specifically appropriated by the *New Orleans Bank* to the payment of such bills, which were drawn in their favour, and made payable to their order; and also for an injunction to restrain the *Bank of Liverpool* from paying over the funds, and for general relief. *Simpson*, the Defendant in the cause as representing the *Bank of Liverpool*, put in an answer to this bill.

Evidence was taken as to the general course of dealing between the *Banks of New Orleans* and of *Liverpool* on the subject of specific appropriation. Mr. *Thomson*, the Plaintiff in that suit, deposed that his partner, Mr. *Bishop*, stated to him that the manager of the *New Orleans Bank* assured him that the bill was drawn against funds of a much larger amount previously remitted to *Liverpool*, and Mr. *Bishop*, who had negotiated the matter with the *New Orleans Bank*, purchased the bill on that assurance, and without such assurance would not have purchased it. The President of the *New Orleans Bank* (Mr. *Forbes*) in substance asserted that he had only said, and meant to say, that there would always be funds to meet whatever bills the *New Orleans Bank* drew against the *Bank*

of Liverpool. In the first instance Vice-Chancellor *Stuart* had held *Thomson & Co.* entitled to payment out of the funds in the possession of the *Liverpool Bank* (1). On appeal, Lord Chancellor *Hatherley* and Lord Justice *James* had reversed this decision, and the bill was ordered to be dismissed with costs (2). This decision was pronounced on the 27th of July, 1870. No appeal was brought.

On the 25th of January, 1868, the *Louisiana Bank* had filed its bill against *Simpson* and the *New Orleans Bank* and *Charles Case.* Witnesses, as in the case of *Thomson* v. *Simpson,* were examined (3), and the cause came to a hearing on the 20th of June, 1871, when the claims of the *Louisiana Bank* were, in accordance with the previous decision, disallowed. This appeal was then brought.

Similar proceedings had been taken in the case of the *New Orleans Canal and Banking Company.*

Mr. *Benjamin,* Q.C., and Mr. *Cracknall,* for the Appellants:—

The bills in this case were drawn against specific funds larger in amount than the bills themselves, funds which had been previously remitted to *England* expressly to meet bills so drawn. That itself was a specific appropriation of the funds. The manager of the *New Orleans Bank* represented that to be the case. There was no question as to his authority; the only question was as to the effect of his representations. On the faith of them the Appellants paid their purchase-money to the *New Orleans Bank* and received these bills in return. The transaction amounted therefore to an equitable assignment of so much of the remitted funds as was required to meet the amount of the bills.

But if there could be any doubt as to what was done amounting to an equitable assignment, there could be no doubt that there had been, by distinct representations, a specific appropriation of the amount of each bill out of the general funds remitted to the *Bank of Liverpool,* and that bank was estopped from now denying the appropriation by the representations so made. It possessed the funds on the understanding that it should accept the bills

(1) Law Rep. 9 Eq. 497.
(2) Law Rep. 5 Ch. Ap. 659.
(3) The particular expressions used by both parties in their conversations respecting the sale of the bills are so fully quoted in the judgment that it is deemed needless to state them here.

1873

CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS.

of the *New Orleans Bank* to the amount of those particular funds. It was not bound to accept any bills drawn upon it, but it was specifically bound to accept bills to the amount of the funds remitted to it, and it had notice of the bills drawn. Each notice of a bill was an appropriation of so much of the funds as would suffice to meet that bill, and the *Bank of Liverpool* was bound to pay out of the general funds the specific amount which had thus been appropriated. The evidence shews that there was an express representation that the purchaser of a bill should be paid out of a particular fund—that fund existed—it was in the possession of the person who was under an obligation to carry that representation into effect. The original debtor said that he would send, and he did send, express orders to the person in possession of the fund to make that particular payment. These facts constituted a clear specific appropriation, out of the general fund, of the amount of each particular bill.

The cases on this subject fully bear out the doctrine now contended for. The Master of the Rolls in this case relied upon *Thomson* v. *Simpson* (1); but that is the case which may now be considered to be under review. That was a case decided on its own particular facts. Here the evidence of appropriation is stronger. The principle laid down in *Hammersley* v. *De Biel* (2) must be applied. There it was held that a representation made by one party for the purpose of influencing the conduct of another, and acted on by him, is sufficient to entitle him to the assistance of a Court of Equity for the purpose of compelling the realisation of such representation. That principle was applied in *Ex parte Imbert* (3) to a case strongly resembling the present. *Carrick* v. *Harrison* (4) was to the same effect. What was asked here by the persons who purchased the bills was not whether the *Bank of Liverpool* had funds of the *New Orleans Bank* in its possession, but whether the funds in the *Liverpool Bank* would be applied to meet these bills. The answer was, in each case, in the affirmative, that there were larger funds than would be required to meet the bill, and that answer amounted to an appropriation of the funds to the amount of the bill. The force of a representation on which a

(1) Law Rep. 5 Ch. Ap. 659.
(2) 12 Cl. & F. 45.
(3) 1 De G. & J. 152.
(4) 2 De G. & J. 208.

person was induced to act, and did act, was shewn in *Morgan* v. *Griffith* (1). There a man verbally agreed to take the lease of a farm, and entered into possession, but finding it overrun with rabbits, he required that there should be inserted in the lease a promise by the landlord to get rid of them. The landlord refused to have such a term inserted in the lease, but said, "I promise you faithfully they shall be destroyed," and on that promise the tenant signed the lease. The promise was not performed, and the tenant brought an action for the damages he had sustained in his crops from the rabbits. Evidence of this parol agreement was admitted, and it was left to the jury to say whether this parol agreement had been made, and whether the lease had been signed on the faith of it, and both questions being answered in the affirmative, the verdict was entered for the Plaintiff, and the Court of Exchequer sustained the verdict. The Defendant was estopped from denying the effect of his own representations. In *Maunsell* v. *White* (2) the principle of liability upon such a representation was fully recognised, but the case failed on the ground that the letters there were not deemed to amount to a promise to do the particular act. *Jorden* v. *Money* (3) was to the same effect. The representation was one merely of intention, not of an existing fact. Here the evidence fully established a promise to pay out of a particular fund, and the fund did really exist, and the promise to pay out of it constituted a specific appropriation of that fund.

Mr. *Fry*, Q.C., and Mr. *Cozens-Hardy*, were for the Respondents, but were not called on to address the House.

THE LORD CHANCELLOR (Lord *Selborne*):—

My Lords, this is a case in which your Lordships are asked, in substance, to review a judgment given by Lord Chancellor *Hatherley* and Lord Justice *James* in the case of *Thomson* v. *Simpson* (4). That was a decision upon the same facts in substance, and I may say also on the same evidence; for although I am aware that there are one or two witnesses in this case who were not witnesses in that, I think their evidence adds nothing in the

(1) Law Rep. 6 Ex. 70.
(2) 4 H. L. C. 1039.
(3) 5 H. L. C. 185.
(4) Law Rep. 5 Ch. Ap. 659.

1873

CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS.

result. There the Lord Chancellor and the Lord Justice reversed the judgment of Vice-Chancellor *Stuart*, and dismissed a bill which made the same claim in the same words as that which the Appellants have made in this case. But the Master of the Rolls upon this occasion not only held the case of *Thomson* v. *Simpson* (1) to be in point, but also he himself gave careful consideration to the effect of the evidence in the present case, and expressed his own opinion to the same effect with the opinion of the Lord Chancellor *Hatherley* and the Lord Justice in that case. That is the state of the matter which is now brought to your Lordships' House for decision. Undoubtedly in this case the Appellants may say that there is here no authority binding upon this House, although there may have been an authority binding upon the Master of the Rolls. It is therefore for your Lordships to determine whether those decisions are in accordance with a sound view of the law and the facts, or whether they are not.

The case made by the bill is put upon two grounds in the alternative. The first ground is the ground of equitable assignment; and the other is (if there has been no equitable assignment) that of estoppel arising from a representation. I understand that Vice-Chancellor *Stuart* proceeded rather upon the latter ground, namely, estoppel arising from representation, than upon the ground of sufficient proof of equitable assignment.

Upon the point of equitable assignment the bill undoubtedly states the case a vast deal higher than it has been attempted to put it in the evidence, because the bill says (2) that the transaction was this: that the *National Bank of New Orleans*, desiring to obtain money from the *Citizens' Bank of Louisiana*, sent Mr. *Harris*, a licensed broker, as its agent, with this proposition: "that if the Plaintiff's bank would give to the said *National Bank* current money of the *United States* in exchange for £5000 sterling, at the rate of exchange then current in *New Orleans*, the said *National Bank* would assign to the Plaintiff an equivalent sum of £5000 out of a much larger sum which the said *National Bank* assured the Plaintiff was then in the hands of the said *Bank of Liverpool*

(1) Law Rep. 5 Ch. Ap, 659.

(2) In the suit of *The Citizens' Bank of Louisiana* (Plaintiff) v. *J. H. Simpson and the First National Bank of New Orleans* (Defendants).

belonging to the said *National Bank*, and which the said *National Bank* assured the Plaintiff, as the fact was, that the said *National Bank* had theretofore remitted for its own account in bills of exchange and other funds to the said *Bank of Liverpool*, and the said *National Bank*, through its said agent and broker *Alexander Harris*, farther proposed to the Plaintiff that if the Plaintiff would give to the said *National Bank* current money of the *United States* in exchange for the said sum of £5000 sterling at the rate of exchange then current in the city of *New Orleans*, the said *National Bank* would effect and carry out an assignment of an equivalent sum of £5000 out of the funds then belonging to the said *National Bank*, and lying at *Liverpool* in the hands of the said *Bank of Liverpool*, by drawing a bill of exchange for the sum of £5000 on the said *Bank of Liverpool*, and specifically appropriating to the payment of such bill of exchange an equal amount out of the funds aforesaid belonging to the said *National Bank*, and then lying in the hands of the said *Bank of Liverpool*."

That is the first part of the case, and of course, if proved, it would have been a very clear case of a contract for an equitable assignment. However, doubting, I suppose, whether that would be supported by the evidence, the Plaintiff went on to charge "that if in fact there was no specific appropriation for the payment of the said two bills of exchange of £5000 each, as hereinbefore set forth, by reason of any default on the part of the said *National Bank* to give notice thereof to the said *Bank of Liverpool*, or of any defect of authority on the part of the said *National Bank* to make such specific appropriation without the consent and concurrence of the said *Liverpool Bank*, or from any other cause whatsoever; yet the said *National Bank* and the said receiver of its assets are, by reason of the assurances and representations made te the Plaintiff when the Plaintiff gave a large and valuable consideration for the said two bills of exchange, and when they were delivered to Plaintiff as hereinbefore set forth, precluded and estopped from so alleging, and from claiming as against the Plaintiff the said funds now in the hands of the said *Liverpool Bank*." My Lords, that latter suggestion seems to have been adopted by Vice-Chancellor *Stuart*, and it has been much insisted upon, and ably insisted upon, before your Lordships this morning by Mr. *Cracknall*,

1873

CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS.

the Appellants' counsel. I propose, in the first instance, to deal with that alternative branch of the case.

I apprehend that nothing can be more certain than this, that the doctrine of equitable estoppel by representation is a wholly different thing from contract, or promise, or equitable assignment, or anything of that sort. The foundation of that doctrine, which is a very important one, and certainly not one likely to be departed from, is this, that if a man dealing with another for value makes statements to him as to existing facts, which being stated would affect the contract, and without reliance upon which, or without the statement of which, the party would not enter into the contract, and which being otherwise than as they were stated, would leave the situation after the contract different from what it would have been if the representations had not been made; then the person making those representations shall, so far as the powers of a Court of Equity extend, be treated as if the representations were true, and shall be compelled to make them good. But those must be representations concerning existing facts.

The limits of that doctrine, and the distinction between it and contract, were carefully examined, and, I think, well pointed out in the judgment given by Lord *Cranworth* in this House in the case of *Jorden* v. *Money* (1), where, after referring to the cases of *Pickard* v. *Sears* (2), and *Freeman* v. *Cooke* (3), which latter case Lord *Cranworth* thought had stated the doctrine somewhat more accurately than it had been expressed in *Pickard* v. *Sears* (2), he says he takes this to be the general result of the rule. He says the rule in *Pickard* v. *Sears* (2) is "that where one by his words or conduct *wilfully causes* another to believe in the existence of a certain state of things, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." And Mr. Baron *Parke* (in a passage quoted with approval by Lord *Cranworth* in *Jorden* v. *Money*) (1) observed, "whether that rule has been correctly acted upon by the jury in all the reported cases in which it has been applied, is not now the question; but the proposition contained in the rule itself, as above

(1) 5 H. L. Cas. 185. (2) 6 Ad. & E. 469.
(3) 2 Ex. 654.

laid down in the case of *Pickard* v. *Sears* (1), must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accordingly; and if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it, as true, the party making the representation would be equally precluded from contesting its truth."

Lord *Cranworth* went on to say that there had been an erroneous application of that rule in the case of *Jorden* v. *Money* (2), which was then before the House, to the facts of that case, which were of this nature: that on the occasion of a young gentleman's marriage, a lady to whom he owed a debt on a bond, who was a great friend of his, said that she abandoned the debt, and then afterwards she, having changed her mind, sued him upon it after the marriage, and it was urged that upon the doctrine of representation she was not at liberty afterwards to claim to have the debt paid. There was some difference of opinion, upon grounds which I need not mention, with regard to the facts of that case; but the judgment of the House was that she was at liberty to sue for the debt; and Lord *Cranworth*, upon the doctrine of representation, said this (3): "I think that that doctrine does not apply to a case where the representation is not of a fact, but a statement of something which the party intends or does not intend to do. In the former case it is a contract, in the latter it is not," and then, after referring to the particular circumstances of the case, he says, that such a statement as was there alleged would have been a perfectly good contract if all statutable requisites to the form of a contract had been complied with, and then he goes on to say: "If she does not perform that promise she is guilty of a breach of contract, in respect of which she may be sued, if it is put into a valid form, but not otherwise; so if she had said, as she did to *William Money*, 'I mean to give you everything I am worth in the world; I promise to do so,' her not doing so, is no fraud in the sense in which these

(1) 6 Ad. & E. 469. (2) 5 H. L. Cas. 185.
(3) 5 H. L. Cas. 213, 214, 215.

1873

CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS.

cases speak of fraud; it is no misrepresentation of a fact which the party is afterwards held bound to make good as true; it seems to me that the distinction is founded upon perfectly good sense, and that in truth in the case of what is something future, there is no reason for the application of the rule, because the parties have only to say 'enter into a contract,' and then all difficulty is removed."

Now, my Lords, I have been endeavouring, in the course of the argument, to ascertain (if I could, for the purpose of seeing whether this doctrine of estoppel arising from representation had any application here), what in that view of the case is the supposed representation which the Respondent is estopped from denying to be true. It is said that something was stated about remittances having been made specifically appropriated to paying drafts to be drawn. If the meaning of what took place really was that for valuable consideration and upon the faith of a specific appropriation of funds, the bill of the one bank was bought by the other bank, that, as I understand the law, would be equitable assignment, because there was a contract, one part of which was that specific funds should be held as specifically appropriated to the payment of that bill. But if it is put, not upon the footing of contract, but upon the footing of representation, what is the representation? It is possible certainly, though I think not very probable, in mercantile dealings of this kind, that the *National Bank* at *New Orleans* might, previously to the negotiation, by some of its statements in *New Orleans*, have constituted a trust of funds originally belonging to that bank, but then in the hands of the *Bank of Liverpool*, by which the *Liverpool Bank* might be bound, as trustee, to apply those funds in payment of bills of a particular class or description. The only representation which would have produced the estoppel to which I have referred, would have been a representation that there was a trust of that description already constituted, of funds then in the hands or to come into the hands of the *Bank of Liverpool*, by reason of something which had already taken place. But I cannot find upon the face of any part of the evidence here the smallest ground whatever for interpreting anything which has been said or done as a representation that a trust of that description, independently of the contract then and there made, had been constituted, so as to make the *Liverpool Bank* at

that time trustee of any funds received or about to be received by that bank. My conclusion, therefore, my Lords, is that this case resolves itself purely into a case of contract and nothing else, and that unless a case of equitable assignment is made out, the appeal altogether fails.

Now what is the evidence as to equitable assignment? My Lords, the strongest part of the evidence would have been, but for cross-examination, that which is identical in the present case and in the case of *Thomson* v. *Simpson*, namely, the evidence of Mr. *Forbes* and Mr. *Meig*, the manager and the agent of the bank which gave the bills. No doubt there are expressions in the evidence of Mr. *Forbes* and Mr. *Meig* which do at first sight appear to go the length of the Appellants' case; that is to say, they appear to amount to a statement that there had been a specific appropriation, to answer bills of which these were part, of the funds in the hands of the *Bank of Liverpool*, and that a communication was made, at the time when the Appellant banks purchased these particular bills, to that effect. If it had rested upon no other than the original affidavits of *Forbes* and *Meig*, unexplained by their cross-examination, I do not feel sure that the Appellants would not have made out their case, or that the natural interpretation of the words used in those affidavits, unexplained, might not have made out that for which the Appellants contend. I would say in passing, that the language of those portions of the affidavits of *Forbes* and *Meig*—made, it is to be remembered, after the bank had become insolvent, and when the question really was between two classes of creditors—is very much stronger than the language used either by Mr. *Gaines* or Mr. *Harris*, who were the parties to this particular transaction, and to one of whom the particular representations and statements were made, and by the other of whom these representations and statements were made.

But if you add to the original statements of *Forbes* and *Meig* their cross-examinations, the whole matter, my Lords, as it appears to me, becomes as clear as daylight. The whole result is this: as a matter of fact, there was no appropriation at all, as between the *Liverpool Bank* and the *New Orleans Bank*, which drew the bills, of any funds or remittances, except in this sense, that it being convenient for the transaction of the business of the *New Orleans*

1873

CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS.

Bank that a number of bills and other funds belonging to itself should be collected in *England* through an English agency, and it being also convenient to have credit upon which the *New Orleans Bank* could draw at *Liverpool* for its own general purposes, the *Liverpool Bank* undertook the office of collecting the bills and other remittances, it being understood between them that the *Liverpool Bank* would honour the bills which might be drawn upon it by the *New Orleans Bank*, but that, as between the two banks, the *Liverpool Bank* was to be covered by advances coming from time to time into its possession. As a matter of fact, the *Liverpool Bank* was kept so covered, and at the time when the transaction in question took place, had in hand a sum of nearly £50,000 of remittances belonging to the *New Orleans Bank*, being more than amply sufficient to meet the bills in question, and, as I collect, other bills also, of the same kind, which had been drawn against them.

These being the arrangements between the two banks, bills of exchange, payable sixty days after sight, in the ordinary form of bills of exchange, and without a syllable pointing to any particular funds, are brought for sale by the one bank at *New Orleans* to the other bank at *New Orleans*, and this passes — we do not know which party asks the question, or whether the information is volunteered—but in substance that passes which is stated in the affidavits of *Gaines* and *Harris*, who, making their affidavits deliberately in support of this bill, must I think be taken to state it as strongly as they could, according to truth, and according to their own understanding of the effect of what passed. For my own part, I very much prefer taking what they say as representing what actually passed, to taking any qualification or modification of that language which is afterwards found either in the cross-examination of *Gaines*, or in any of the statements of *Forbes* and of *Meig*, which they explain and shew to amount to nothing whatever beyond this in their cross-examination. Now, what is the statement that *Gaines* makes? He was the president of the *Louisiana Bank*. In his evidence he says that *Harris*, a bill broker employed by the *National Bank of New Orleans*, called upon him at the offices of his own bank, "and requested me to purchase, on behalf of my said bank, a bill of exchange for £5000,

drawn by the said *Bank of New Orleans* on the said *Bank of Liverpool*. I was not desirous of purchasing the said bill, and at first declined to purchase it, and the said Mr. *Alexander Harris* then stated that he was authorized by Mr. *Forbes* (who, as I knew, was the president of the said *First National Bank of New Orleans*), to say that the said bill was drawn expressly against funds to a much larger amount already remitted to the said *Bank of Liverpool*, and I therefore, and on the faith of this assurance, agreed to purchase, and did in fact purchase, the said bill of exchange on account of the said bank." Then a second bill was brought on the 2nd of May, 1867, and he says, "The said Mr. *Alexander Harris* assured me that the last-mentioned bill of exchange was also drawn specially against funds to a larger amount already remitted to the said *Bank of Liverpool*." On the one occasion the word "expressly" is used—"drawn expressly against funds"—and on the other occasion the word "specially" is used, "drawn specially against funds." But he does not pretend in his evidence-in-chief to go at all beyond that.

Is that an equitable assignment? Is that an appropriation of such a kind, that from the moment when that transaction took place as between the two banks, the *Citizens' Bank* would become purchasers *pro tanto*, to the amount necessary to answer this bill drawn at sixty days' sight, of previous remittances made by the drawers to their agents at *Liverpool*, in order to provide for that and other bills which they might draw? My Lords, it seems to me that the transaction is simply one of the most ordinary mercantile kind, and perfectly consistent with the ordinary course of dealing between the *Liverpool Bank* and the drawers of the bills, which upon the whole of the correspondence and the evidence plainly was not one of specific trust or appropriation of any particular funds. The transaction was really of this kind—a person asked to take a bill wants to know distinctly whether the person who has drawn it has made provision for its payment. The statement is, we have sent forward to *Liverpool* funds of a much larger amount, which are intended to be used in the payment of these and other bills. My Lords, if that be a specific appropriation or an equitable assignment, it follows that every ordinary transaction in commerce, where any inquiry whatever is made, would come into

1873

CITIZENS' BANK OF LOUISIANA v. FIRST NATIONAL BANK OF NEW ORLEANS.

the same category. If any one draws a cheque and gives a cheque upon a bank, it is a fraud, in one sense (a very intelligible sense), to do that if he has no account there. If he is known to have an account there it is very likely that no question will be asked. But suppose a question is asked, and he says, "I have a sufficient balance to meet it," is that an equitable assignment of the balance? If it is not, there is no evidence of assignment here.

This is the view which the Court took in the case of *Thomson* v. *Simpson*, it is the view upon what the Master of the Rolls based his decree in the present case, and, my Lords, in my humble judgment that decree is perfectly correct. I therefore advise and move your Lordships that this appeal be dismissed with costs.

LORD CHELMSFORD:—

My Lords, I entirely agree with my noble and learned friend. The case is one entirely of fact, and it appears to me to be abundantly clear. My noble and learned friend has explained so fully and so satisfactorily the grounds of his judgment, both upon the question as to the alleged representation amounting to an estoppel, and also upon the question of a supposed specific appropriation of the funds in the hands of the *Liverpool Bank*, amounting to an equitable assignment, that I feel that I have really nothing farther to add, but to express my agreement with my noble and learned friend.

LORD COLONSAY concurred.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journal, 19th June, 1873.

Solicitors for Appellants: *Clarke, Son, & Rawlins.*
Solicitors for Respondents: *Sharpe, Parkers, & Co.*

THE ATTORNEY-GENERAL AND THE COMMISSIONERS OF SEWERS OF THE CITY OF LONDON . . . . . } APPELLANTS;

AND

THE DIRECTORS, &c., OF THE GREAT EASTERN RAILWAY COMPANY . . . } RESPONDENTS.

1873
July 14.

Railway—Power to stop up a Street—Deposited Plans.

A railway Act obtained by the *Great Eastern Railway Company* for extending its line into the city of *London*, and there making a station, incorporated the *Railways Clauses Consolidation Act*, 1845, and declared that plans and sections "had been deposited," and then gave a general power to stop up streets within a given area. *Sun Street* was within the area, but the plans and sections had described it as crossed by "an arch;" and in a subsequent Act, where many of the levels were altered, it was spoken of as crossed underground by a tunnel. The railway company proposed to build a station on the soil of *Sun Street*:—

Held, that the company might do so; for, that the street being within the area described, there was nothing inconsistent in the provisions of the Acts, the power to cross the street by an arch, or a tunnel, not affecting the right to use the surface of the soil for a station to be built within the area described in the Act.

THIS was an appeal against a decree of the Lords Justices by which an order for an injunction made by Vice-Chancellor *Bacon* was discharged, and the Respondents were declared entitled to take possession of *Sun Street, Bishopsgate*, stop it up, and convert its site into a railway station. The question to be determined depended on the construction of two clauses (the 6th and 8th clauses) of the private Act of the Respondents, passed in 1864, taken together with two sections of the *Railways Clauses Act*, 1845 (13th and 14th sections), which were incorporated with them.

The facts of the case, the sections and clauses, are fully set forth in the report of the case in the Court below (1), and in the judgments in this case.

(1) Law Rep. 7 Ch. Ap. 475.

1873

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

The *Solicitor-General* (Sir *G. Jessel*), and Mr. *Amphlett*, Q.C. (Mr. *Yool* was with them), for the Appellants:—

The decision of the Court below entirely disregards the provisions of the *Railways Clauses Consolidation Act*, 1845. Yet that Act is expressly incorporated with this company's railway Act of 1864, and therefore forms part of it, and must be read with it. The general Act declares that all its clauses, except those expressly excepted or varied, shall apply to any private Act. There is no such exception or variation in the company's Act. By the general statute, deposited plans and sections must be followed exactly. If those which were deposited when this particular railway Act was passed had been exactly followed, the contest which has now arisen never could have occurred. But the railway Act of 1864 contained in itself provisions of a similar sort, so that it was not necessary to have recourse to the general statute. The 6th clause of the Act of 1864 stated that plans and sections of the proposed railways, the lines and levels, and of the lands required, and of the intended station in the city of *London*, and books of reference thereto, had been deposited; and it enacted that, subject to the powers of deviation in this and the existing Acts contained, the railways should be made according to the plans thereby described, and for that purpose it should be lawful for the company to take such lands as were required, except as thereinafter mentioned. *The North British Railway Company* v. *Tod* (1) is upon this part of the case much relied on by the other side; but that case really decided little more than this, that the mere exhibition of a plan would not be decisive against those who exhibited it, unless incorporated with or distinctly referred to in the Act. Here that condition was complied with. The Act distinctly referred to the plan and sections. The plan itself specially referred to *Sun Street*, described the arch and its height, and added the words "*Sun Street* unaltered," and this plan was described in the Act, and was therefore incorporated in it. This was not like the mere exhibition of a plan to intending purchasers of an estate: *The Feoffees of Heriot's Hospital* v. *Gibson* (2); it was, in fact, part of a contract

(1) 12 Cl. & F. 722.

(2) 2 Dow. 301. See *Gordon* v. *Majoribanks*, 6 Dow. 87.

1873

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

which was incorporated in an Act of Parliament. Under the 13th and 14th sections of the general statute, the plan thus deposited became absolutely binding on the company. In no subsequent Act was this plan declared to be inapplicable, nor was it in any way interfered with. It is said that the 8th clause of the *Companies Act* affects it. But that clause merely says that "the company may stop up all streets and highways within the area hereinbefore described as the site of the intended station." [LORD CHELMSFORD:—Is it denied that the area described embraces *Sun Street?*] Certain portions of it may be so, but the other parts of the Act shew that *Sun Street* is not to be stopped up, and the deposited plan shews that an arch is to be thrown over it. [LORD CAIRNS:—The Act of 1870 expressly authorizes the Respondents to change their high level to a low level.] The Act of 1870 only permits the company to deviate from the authorized levels of the previous Act to such an extent as may be necessary in crossing any street. This manifests a desire to preserve the convenient use of any street, and not to destroy the street itself. The 34th clause of the Act of 1870 recites that the company intends to enclose lands lying between *Sun Street* and *Liverpool Street*, in order to construct a low-level station, and that it is desirable to maintain a communication between *Sun Street* and *Liverpool Street*, and states how this communication is to be effected. The company relies on this section; but surely nothing could be more inconsistent than to pretend to direct how a communication was to be established between two streets, while at the same time one of the two was authorized to be entirely destroyed. Nor does the 38th clause of the Act of 1870 at all affect this previous Act, no clause of which is incapable of being carried into effect with the provisions of the recent Act.

The 8th clause of the Act of 1864 cannot and does not repeal the 13th and 14th sections of the general statute, and yet it was on this supposed repeal that Lord Justice *Mellish* chiefly relied. The rule is the other way. Private Acts (and these Acts of 1864 and 1870 are private Acts) are to be construed strictly against the parties obtaining them: *Parker* v. *Great Western Railway Company* (1);

(1) 7 Scott N. R. 835; 13 L. J. (C. P.) 105.

1873

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

Stourbridge Canal Company v. *Wheeley* (1); *Scales* v. *Pickering* (2); *Smith* v. *Bell* (3); *Hughes* v. *The Chester and Holyhead Railway Company* (4). And when one public Act or a general law exists, and another Act is passed with reference to the same subject, its interpretation must be decided by what appears from a consideration of the existing law to have been the intention of the Legislature: *Hawkins* v. *Gathercole* (5). That rule was acted on in *Cope* v. *Doherty* (6).

Here it will be said that there are special words which shew the special intention of the Legislature. But there are no words which expressly vary or repeal the previous provisions either of the private Acts or of the general statute. Now where that is the case, the general words of the existing Acts remain unaffected by special words found in a subsequent Act: *The Attorney-General* v. *The Leeds Corporation* (7); *De Winton* v. *The Mayor of Brecon* (8); *Pretty* v. *Solly* (9). The case of *The North British Railway Company* v. *Tod* (10) does not affect any of these authorities, and on account of the difference of the facts between that case and this can have no effect upon the present. In the case of *The Attorney-General* v. *The Tewkesbury and Malvern Railway Company* (11), where plans were deposited, as they were here, the parties who deposited them were held bound to carry them into effect.

Mr. *Kay*, Q.C., Mr. *Eddis*, Q.C., and Mr. *Newton R. Smart*, who appeared for the Respondents, were not called on.

LORD CHELMSFORD:—

My Lords, the short point in this appeal depends upon the construction of two clauses in the special Act for the formation of the Respondents' railway and in the *Railways Clauses Consolidation Act*, which is incorporated in it.

(1) 2 B. & Ad. 792.
(2) 4 Bing. 448.
(3) 10 M. & W. 378.
(4) 3 D. F. & J. 352.
(5) 6 D. M. & G. 1.
(6) 2 De G. & J. 614.
(7) Law Rep. 5 Ch. Ap. 583.
(8) 26 Beav. 533.
(9) Ibid. 606.
(10) 12 Cl. & F. 722.
(11) 1 D. J. & S. 423.

The preamble of the special Act, which was passed in 1864, recites that "It is expedient that the company should be authorized to purchase all the lands and buildings in the city of *London* comprised within an area bounded on the northern side by the properties numbered respectively 315, 316, 531, and 545, in the parish of *St. Botolph, Bishopsgate*, on the deposited plans hereinafter referred to on the western side" (then a detailed description follows), "and to stop up all streets and highways within the said area, and to appropriate the site of such area to the purposes of a railway station." By the 6th clause of that special Act it is recited that, "Whereas plans and sections of the proposed railways, shewing the lines and levels thereof respectively, and the lands required for the purposes thereof, and of the said intended station in the city of *London*, and of the enlargement of the *Bishopsgate Station*, and of the other purposes of the undertaking:" "Therefore, subject to the provisions and powers of deviation in this Act and the Acts incorporated therewith contained, the said railways shall be made in the line or within the limits of deviation and upon the lands delineated on the said plans and described in the said books of reference, and according to the levels defined in the said sections; and it shall be lawful for the company to enter upon, take, and use all or any of the said lands, except as hereinafter mentioned, which they may require for the purposes thereof or for the purposes of the said intended station and enlargement, or other purposes of the undertaking." Then the 8th section says: "The company may stop up and cause to be discontinued as public highways all streets and highways within the area hereinbefore described as the site of the intended station, and may appropriate the site of such streets and highways to the purposes of such station; but the western moiety or half, part of the site of *Peter Street*, shall from the time of such stopping up be vested in and belong to the *North London Railway Company;* and nothing herein contained shall authorize the stopping up of the said street or public place known as *Broad Street Buildings*, and Number 57, in the parish of *St. Botolph, Bishopsgate*, on the said deposited plans." It is admitted that this area embraces *Sun Street*. Looking to the special Act alone, there is nothing inconsistent in saying that the

1873

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

railway shall be carried over *Sun Street* by an arch and at the same time saying that the company "may appropriate the site of such streets to the purposes" of a station.

But the Appellants say that the 13th and 14th sections of the *Railways Clauses Consolidation Act* compel the company to leave *Sun Street* without interfering with it farther than by carrying the railway upon an arch over it. The 13th and 14th sections of the *Railways Clauses Consolidation Act* are in the following terms: "Where in any place it is intended to carry the railway on an arch or arches or other viaduct, as marked on the said plan or section, the same shall be made accordingly." "It shall not be lawful for the company to deviate from or alter the gradients, curves, tunnels, or other engineering works described in the said plan and section, except within" certain limits and under certain conditions not applicable to the present case. By the first clause of the general Act it is enacted: "That this Act shall apply to every railway which shall by any Act which shall hereafter be passed be authorized to be constructed; and this Act shall be incorporated with such Act, and all the clauses and provisions of this Act, save so far as they shall be expressly varied or excepted by any such Act, shall apply to the undertaking authorized thereby, so far as the same shall be applicable to such undertaking, and shall, as well as the clauses and provisions of every other Act which shall be incorporated with such Act, form part of such Act and be construed together therewith as forming one Act."

It is contended on the part of the Appellants, that unless the special Act expressly varies or excepts these particular clauses, the 13th and 14th clauses of the general Act apply, and that they compel the Respondents in this case to make their railway over *Sun Street* upon an arch, as delineated on the plans and sections. Now it must be observed that those clauses, as Lord Justice *Mellish* observes, are not amongst the class of clauses for carrying railways over streets and highways, but they are in the class of clauses for the construction of railways. It appears to me, therefore, that all that these clauses can be understood to mean is this: if on the plans and sections a railway is delineated as to be carried over a street by a particular arch, then in carrying out that work you

must abide by your plans and sections, and you cannot depart from them. But it does not appear to me that it is at all inconsistent, as I have already said, with these 13th and 14th clauses to say that, in addition to carrying the railway over a street by a particular description of arch, namely, an arch 16 feet high, and with a 35-feet span, the Respondents shall have the power to appropriate to themselves the street itself for the purpose of their station. Undoubtedly it is quite competent to the Appellants to say that the 8th clause does not vary the 13th and 14th clauses, or form any exception to them; nor can it be said to be inconsistent with them in any respect. The 13th and 14th clauses may have their proper operation, and at the same time the 8th clause may operate also upon the powers given to the Respondents, and enable them to take *Sun Street*, supposing it is within the area described by their special Act.

Now the Act of 1870 appears to me, as has been observed in the course of the argument by my noble and learned friend near me (Lord *Cairns*), to put the question in a stronger way in favour of the company, because by that Act of 1870 the Respondents are empowered to change their high level to a low level; and, according to the plans referred to in that Act, *Sun Street*, instead of being crossed by an arch, is to be passed by means of a tunnel underground. By the 38th section of that Act of 1870 it is provided that, "Except as by this Act otherwise expressly provided, nothing in this Act contained shall repeal, alter, prejudice, or affect any of the provisions of the Act of 1864 (the *Station Act*), contained in the 8th and following sections of the said Act to the 73rd section inclusive, so far as such provisions are applicable and capable of being carried into effect consistently with the alterations by this Act authorized to be made in the railways and works authorized by that Act; and where by this Act any such alteration or any new railway, or works in substitution for any such authorized railway or works, is authorized to be made, such provision shall apply to the alteration, or to the new railway or works, if applicable or capable of being carried into effect with reference thereto, in like manner in all respects as the same respectively would have applied to the authorized railway or work." Therefore the 8th

1873

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

section applies, supposing it to be applicable, to this railway of 1870. But by the Act of 1870 the arch is to be entirely got rid of, and the railway is to be carried underground, instead of over *Sun Street*. Then the 13th section of the general Act, upon which reliance is placed, is no longer applicable; and if I may use the expression, there seems to be less inconsistency under the Act of 1870 in saying that the railway shall be carried under *Sun Street* and at the same time giving a power to appropriate *Sun Street* to the purposes of a station.

It has been said that it never could have been the intention of the Legislature to stop up so important a thoroughfare as *Sun Street*. It is impossible for us to speculate upon what the intention of the Legislature may have been; we must only construe the language which they have used; and undoubtedly in terms the Legislature have given the power to this company to stop up *Sun Street* and to appropriate it to the purposes of a station. It may have been a very indiscreet thing—if I may use that expression as applicable to the Legislature—to confer such a power upon the company; but the matter evidently did not pass *per incuriam*, because in the very section by which the power is given generally to stop up *Sun Street*, as being within the specified area, there is an express prohibition against stopping up *Broad Street Buildings*, and therefore the attention of the Legislature was called to the importance of particular streets, and yet they allowed the Act to pass empowering the company entirely to stop up *Sun Street*.

Under these circumstances, my Lords, I feel no difficulty whatever in saying that I think that the decree of the Lords Justices is right, and that it ought to be affirmed.

LORD COLONSAY:—

My Lords, I have come to the same conclusion. The argument on the part of the Appellants was a very ingenious one, but I do not think it would stand even as regards the first Act of Parliament, which was passed in 1864. Then I think the Act of 1870 brings in a somewhat new feature, which goes altogether in the same direction. Therefore, my Lords, I think that we ought to

affirm the judgment which has been pronounced by the Court below.

1873

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO

LORD CAIRNS :—

My Lords, I concur in the opinion which has been expressed by my noble and learned friends.

LORD HATHERLEY :—

My Lords, I am of the same opinion. I have been unable, I confess, to see the inconsistency between the 13th section of the general statute imported into the special Act of 1864 and the provision in the 8th section of that special Act for the using of the site of any of these streets for a railway station. It seems to me completely consistent, supposing the 13th section to be imported bodily into the special Act, to say that, when you are making your railway over these streets and places in the manner designated by the 6th section of the special Act, it shall and must be constructed according to the course designated upon your deposited plan and sections, and any traversing by a viaduct where the railway is represented on the plan as traversing by a viaduct, must be performed in the manner described upon the plan, and according to the dimensions, width, and height shewn upon that plan and the sections, and at the same time to say, by way of proviso, that, notwithstanding this, you are to be at liberty to stop up any of those streets, and to make use of the site of any of them as you may think fit for the purpose of a railway station, which would have the effect ordinarily of entirely stopping them up. And if not, there is an express power given so to do. There is no direct contradiction in that; there is nothing but the inferential contradiction which has been attempted to be supported in argument. I do not think there is such a contradiction as to interfere with a clear, plain, and explicit power of stopping up every street except one, namely, *Broad Street Buildings* (which makes the case, of course, a good deal stronger as regards every other street), simply because it is provided that if you do cross a

1873

ATTORNEY-GENERAL v. GREAT EASTERN RAILWAY CO.

street you must cross it in the manner described upon the plan and sections.

On these grounds, my Lords, I concur with my noble and learned friends in the conclusion to which they have arrived, that the appeal must be dismissed.

Decree appealed from affirmed, and appeal dismissed with costs.

Lords' Journal, 14*th July*, 1873.

Solicitor for the Appellants: *A. J. Baylis.*
Solicitor for the Respondents: *W. H. Shaw.*

WILLIAM PEEK . . . . . APPELLANT;

AND

J. H. GURNEY, H. E. GURNEY, ROBERT BIRKBECK, H. F. BARCLAY, H. G. GORDON, W. RENNIE, T. J. GIBB AND J. D. GIBB, THE OVEREND & GURNEY COMPANY AND W. TURQUAND, AND R. P. HARDING, THE LIQUIDATORS . . . . . RESPONDENTS.

1873

June 19, 20, 24, 26, 27; *July* 10, 31.

Company—Prospectus—Allottee—Purchaser of Shares.

The proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares, or original shareholders in the company. When it has performed this office it is exhausted.

A prospectus of an intended company ought not to misrepresent actual and material facts, or to conceal facts material to be known, the misrepresentation or concealment of which may improperly influence and mislead the mind of the reader, for if he is thereby deceived into becoming an allottee of shares, and, in consequence, suffers loss, he is entitled to proceed against those who had thus misled him. But the responsibility of directors who issue a prospectus for an intended company misrepresenting actual and material facts, or concealing facts material to be known, does not, as of course, follow the shares on their transfer from an allottee to his vendee. In order that this third person, the vendee, should be enabled to maintain any proceeding at Law, or in Equity, against the directors in respect of losses occasioned by his belief in the prospectus and his consequent procurement of shares, he must shew some direct connection between them and himself in the communication of the prospectus, and its influence upon his conduct in becoming an allottee: *Seymour* v. *Bagshaw* (1) and *Bedford* v. *Bagshaw* (2) overruled. *Scott* v. *Dixon* (3) and *Gerhard* v. *Bates* (4) explained and adopted.

The rule as to delay in seeking for compensation for losses thus occasioned is, in Common Law proceedings, that which is prescribed by the *Statute of Limitations*, and the rule in Equity follows by analogy that of the Law. Where, therefore, a person became possessed of shares in October, 1865, and the company was ordered in June, 1866, to be wound up, and he contested his liability to be made a contributory, but was, in July, 1867, declared liable as such, and in March, 1868, filed his bill against the directors to be indemnified by them:—

Held, that delay could not be set up as an answer to the suit.

The proceeding in such a case is like an action at law for deceit (the

(1) 18 C. B. 903; 29 L. J. (Ex.) 62, n.
(2) 4 H. & N. 538; 29 L. J. (Ex.) 59.
(3) 29 L. J. (Ex.) 62, n.
(4) 2 El. & Bl. 476.

1873
PEEK
v.
GURNEY.

same principle being applicable in such a matter both at Law and in Equity), and is therefore of a personal character, and the estate of a deceased director not being alleged and proved to have received benefit from the deceit, his executors cannot be made liable to compensate the person who asserts that he has been injured by it.

One of the projectors of a company, ~~a partner of the old firm which sold its business to the company~~, set up as a defence that he had not taken part in preparing or issuing the prospectus; he knew, however, all that the other directors knew, consented to become a director of the company, signed the memorandum and articles of association, and shares were appropriated to him:

Held, that under these circumstances he could not avail himself of this defence.

Per LORD CAIRNS:—Mere non-disclosure of facts, unless such non-disclosure had the effect of making the disclosed facts absolutely false, would not be sufficient to sustain a proceeding which was really in the nature of an action for misrepresentation.

A prospectus for an intended company was prepared by the projectors (the directors of the company), and issued by them to the public: it contained misrepresentations of facts, facts known to those who issued it, and it also concealed the existence of a deed, which was material to be known, and which, if known, would, in all probability, have prevented the formation of the company. Being addressed to the whole public, any one might take up the prospectus and appropriate to himself its representations, by applying for an allotment of shares:—

Held, that when the allotment was completed the office of the prospectus was exhausted, and that a person who had not become an allottee, but was only a subsequent purchaser of shares in the market, was not so connected with the prospectus as to render those who had issued it liable to indemnify him against the losses which he had suffered in consequence of his purchase.

THIS was an appeal against a decree of the Master of the Rolls, by which the Appellant's bill had been dismissed with costs (1).

The Appellant, when the *Overend & Gurney Company* was ordered to be wound up, was the holder therein of 2000 shares, in respect of which he was placed on the list of contributories, and his liability to be so was confirmed by a decision of this House (2).

The history of the company has already been fully given in the previous reports of this case. The following brief summary of the facts is all that is now necessary to be stated.

The company was formed in July, 1865, and the prospectus then issued. The business was begun on the 1st of August, 1865. The Appellant was not an original allottee, but purchased his shares in the market in the months of October and December of that year.

(1) Law Rep. 13 Eq. 79. (2) Law Rep. 2 H. L. 325.

(a) See W.N. (1874) 77.

On the 10th of May, 1866, the company stopped payment. On the 11th of June a resolution was passed to have a voluntary winding-up, and on the 22nd of June the usual order for such winding-up, under supervision of the Court, was made. The Appellant who had been by this House, in July, 1867, declared to be liable as a contributory, and had paid nearly £100,000 on his shares under this winding-up, filed his bill in March, 1868, against the then directors, and against the executors of *Thomas Augustus Gibb*, who had been a director at the time of issuing the prospectus, but had died in November, 1866. The bill alleged misrepresentation of facts and concealment of facts on the part of the directors in the prospectus they issued, by which the Appellant had been induced to purchase shares and had been damnified, and he sought indemnity from the estates of the directors.

The Master of the Rolls had held that if he had been an original allottee, and had come in due time, he would have been entitled to such indemnity, but that he was debarred of his remedy on the grounds, first, that he was in no better position than the allottee from whom he had bought, and secondly, that he had come too late for relief. His bill was therefore dismissed with costs (1). Against that dismissal this appeal was brought.

Mr. *Kay*, Q.C., and Mr. *Swanston*, Q.C. (Mr. *Jolliffe* was with them), for the Appellant:—

Fraud is clearly established by the evidence in this case; but actual fraud is not necessary in order to give a ground for relief in Equity. The statements in the prospectus were not only calculated, but were intended, to deceive. These statements were made, and meant, to have effect on all who should read the prospectus, and there was no thought of limiting the effect of that prospectus within a certain time, or of confining it to a certain class of readers. The object of those who framed it was the reverse. The allottees would, of course, be those who were first deceived by it, but the intention to deceive was not confined to them alone. Those who

(1) The facts of the case and the arguments are so fully stated in the report in the Court below, that it has been deemed only necessary here to give them in a very abridged form, the more so as the judgment related principally to the rights of a purchaser from an allottee.

1873
PEEK
v.
GURNEY.

purchased from these first allottees would be persons who, like them, were deceived by the misrepresentations in the prospectus, the circulation of which, so far from being confined to the first allottees, was never for one moment suspended, but was pertinaciously kept up. The evidence here shewed not merely concealment of what ought to have been stated, but wilful misrepresentation of what was the actual state of facts.

There could be no doubt about the intention of the parties when it was recollected that there had been a very careful concealment of one of the deeds, which deed, deemed by the concoctors of the scheme to be absolutely necessary to enable them to carry the scheme into effect, had it been known to the public, would have prevented entirely the formation of the company. The mischief done was like that occasioned by a person throwing a lighted squib into a crowd, not one particular person but any or all might suffer from it; it was therefore an act for which, wherever it occasioned mischief, the wrongdoer was by law held responsible to the person injured. That was the rule of Law, and the same rule must exist in Equity. And Equity has clearly authority in such a case to afford relief to the injured party.

As to *Barclay*, he was as well informed as any one else on the facts of the case, and with that full information, though he might not have joined in actually preparing the prospectus, he joined in doing all that was required for getting up this company, and selling the insolvent business of the partnership to the company as a solvent business, and in fraudulently representing it to be a flourishing business. This was done when those who concocted the whole scheme knew it to be hopelessly insolvent.

As to *Gibb*, this was not like a case of a mere personal wrong, an assault for instance, it was a matter relating to property, and *Gibb* having by his conduct, assisted in occasioning a loss of property to the Plaintiff, his estate was bound to assist in compensating him.

There had been no wrongful delay in this case. As soon as the real nature of the matter and of the Appellant's liability were known the bill was filed to seek indemnity.

The cases cited in argument for the Appellant were the following *New Brunswick and Canada Railway Company* v. *Muggeridge* (1),

(1) 1 Dr. & Sm. 363, 381.

where Vice-Chancellor *Kindersley* laid down the rule as to the duty of those who issued a prospectus inviting the public to take shares on the faith of representations therein made, that such representations must be made "with strict and scrupulous accuracy," a rule which Vice-Chancellor *Wood*, in *Henderson* v. *Lacon* (1), described as "a golden legacy" left to the public, and which was expressly adopted by Lord Chancellor *Chelmsford*, in the *Venezuela Company* v. *Kisch* (2). The principle thus stated had been both before and since recognised in *Oakes* v. *Turquand* and *Peek* v. *Turquand*, *In re Overend & Gurney* (3); *Pasley* v. *Freeman* (4); *Burnes* v. *Pennell* (5); *Evans* v. *Bicknell* (6); *Burrowes* v. *Lock* (7); *Slim* v. *Croucher* (8); *Rawlins* v. *Wickham* (9); *Colt* v. *Woollaston* (10); *Barry* v. *Croskey* (11); *Ramshire* v. *Bolton* (12); *Ogilvie* v. *Currie* (13); *Clarke* v. *Dickson* (14); *Tapp* v. *Lee* (15); *Foster* v. *Charles* (16); *Chandelor* v. *Lopus* (17); *Ingram* v. *Thorp* (18); *Barwick* v. *English Joint Stock Bank* (19); *Bedford* v. *Bagshaw* (20); *Bagshaw* v. *Seymour* (21); *Duranty's Case* (22); *Gerhard* v. *Bates* (23); *Blain* v. *Agar* (24); *The Western Bank of Scotland* v. *Addie* (25); *Walsham* v. *Stainton* (26); *Davidson* v. *Tulloch* (27); *Scott* v. *Dixon* (28); *Levy* v. *Langridge* (29).

The *Solicitor-General* (Sir *G. Jessel*), Mr. *Macnaghten*, and Mr. *C. S. Medd*, appeared for *Rennie*.

(1) Law Rep. 5 Eq. 249, 262.
(2) Law Rep. 2 H. L. 99–113.
(3) Ibid. 325.
(4) 3 T. R. 51.
(5) 2 H. L. C. 497.
(6) 6 Ves. 174.
(7) 10 Ves. 470.
(8) 1 De G. F. & J. 518.
(9) 3 De G. & J. 304.
(10) 2 P. Wms. 154.
(11) 2 J. & H. 1.
(12) Law Rep. 8 Eq. 294.
(13) 37 L. J. (Ch.) 541.
(14) El. Bl. & El. 148; and again, 6 C. B. (N.S.) 453.
(15) 3 Bos. & Pul. 367.
(16) 6 Bing. 396; and again, 7 Id. 105.
(17) Cro. Jac. 4; 1 Sm. L. C. 140, and n.
(18) 7 Hare, 67.
(19) Law Rep. 2 Ex. 259.
(20) 4 H. & N. 538; 29 L. J. (Ex), 59.
(21) 18 C. B. 903; 29 L. J. (Ex.), 62, n.
(22) 26 Beav. 268.
(23) 2 El. & Bl. 476.
(24) 1 Sim. 37; 2 Sim. 289.
(25) Law Rep. 1 H. L., Sc. 145.
(26) 1 D. J. & S. 678.
(27) 3 Macq. Sc. Ap. 7[illegible].
(28) 29 L. J. (Ex.) 62, n.
(29) 4 M. & W. 337.

1873
PEEK
v.
GURNEY.

Mr. *Roxburgh*, Q.C., Mr. *Lindley*, Q.C., and Mr. *Graham Hastings*, for *J. H. Gurney*, *H. E. Gurney*, and *R. Birkbeck*.

Mr. *Fry*, Q.C., Mr. *Jackson*, Q.C., and Mr. *Sayer*, were for *H. F. Barclay*.

Mr. *Fooks*, Q.C., and Mr. *W. Fooks*, were for *H. G. Gordon*.

Sir *R. Baggallay*, Q.C., and Mr. *Macnaghten*, were for the executors of *Gibb* (1):—

The relief sought in this case can only be granted on the ground of fraud, and there was no fraud here.

Misrepresentation is denied. The statements made were fair, and the belief expressed on the prospectus, though ultimately disappointed, was, at the time, truly entertained. But even assuming that there had been misrepresentation, there had been none made to the Appellant. There had been no communication between him and the directors. He had not taken shares on the faith of the statements made in the prospectus—he, acting no doubt upon general opinion, bought them in the open market a long time after the prospectus had been issued, and its direct operation had come to an end. There was, indeed, nothing to connect his purchase with the prospectus, or with those who issued it. Whatever, therefore, might have been alleged by an original allottee against the representations in the prospectus (which, however, the Respondents insisted to have been fair and proper), they could not be put forward as those on which the Appellant had been induced to purchase shares. Under these circumstances he could not have maintained on this prospectus an action at law for deceit; for he could not have connected himself with the prospectus or with those who issued it, nor could he shew that he had been deceived by anything they had done. If so, then it was quite clear that he could not come into equity to ask for what the very principles of the law—not its mere forms of procedure—would not allow him to obtain. No representation whatever had been made by the directors to this Appellant, who consequently had no title whatever to

(1) The arguments for the Respondents were, on the general question of the right of the Appellant to claim relief, similar in each case, except as to the executors of Mr. *Gibb*, who insisted that his estate, in their hands, was not liable. The argument as to delay was not pressed.

come against them for compensation. The bill asked for relief on the ground of fraud; no fraud had been substantiated, and therefore no relief on any other ground could now be asked.

As to *Gibb*, the demand for relief could not be supported. Even if wrong had been committed by the whole body of directors, of which he was only an individual member, his estate could not be made liable. If there had been any fraud, then the commission of it was a personal act of wrong, for which he who committed it would be liable during his life, but the liability would not descend to his representatives, who were wholly innocent of it. And here, too, there was not a pretence for saying that, supposing the wrong to have been committed, there had been any benefit whatever accruing to the estate of him who had committed it. The estate, therefore, could not be made liable.

As to *Barclay*, he had not taken any part in issuing the prospectus, and therefore, could not be made liable for any losses that it might be alleged to have produced.

The cases cited for the Appellant were commented on and sought to be distinguished, and the following cases were, in addition, referred to by the Respondent's counsel: *Kerr* on Frauds (1), shewing that the *caveat emptor* principle applied here; *Ship* v. *Croskill* (2); *The Land Credit Company of Ireland* v. *Lord Fermoy*, on appeal (3); *Houlton's Case* (4); *Powell* v. *Aiken* (5); *Davidson* v. *Tulloch* (6); *Lansdowne* v. *Lansdowne* (7); *Moore* v. *Burke* (8); *Cullen* v. *Thomson* (9); *Keates* v. *Cadogan* (10); *Hambly* v. *Trott* (11); *Bishop of Winchester* v. *Knight* (12); *Joint Stock Discount Company* v. *Brown* (13).

Mr. *Kay* replied.

LORD CHELMSFORD :—

This is an appeal from a decree of the Master of the Rolls, in a suit in which the Appellant was Plaintiff and the Respon-

(1) Page 274.
(2) Law Rep. 10 Eq. 73.
(3) Law Rep. 5 Ch. Ap. 763.
(4) 1 Mer. 616.
(5) 4 K. & J. 343, 352.
(6) 3 Macq. Sc. Ap. 783.
(7) 1 Madd. 116.
(8) 4 F. & F. 258.
(9) 4 Macq. Sc. Ap. 424.
(10) 10 C. B. 591; 20 L. J. (C.P.) 76.
(11) Cowp. 371.
(12) 1 P. Wms. 406.
(13) Law Rep. 8 Eq. 381.

1873

PEEK v. GURNEY.

dents were Defendants, dismissing the Appellant's bill without costs.

The bill prayed in substance that the Respondents, the directors of the company called the *Overend & Gurney Company*, and the Respondents, the Messrs. *Gibb*, the executors of a deceased director, might be decreed to make good to the Appellant or indemnify him against the loss which he had sustained by reason of his having become the purchaser of 2000 shares in the company, and having been, as he alleged, deceived and misled by a prospectus put forth by the Respondents and the deceased director, containing several misrepresentations and suppressions of material and important facts, with a view to deceive and mislead the public, and the Appellant as one of the public.

The Master of the Rolls dismissed the Appellant's bill, solely on the ground of his delay in instituting proceedings; but he dismissed it without costs, because in his opinion "the directors were guilty of gross misconduct in concealing the insolvency of the old firm" (1) of *Overend & Gurney*.

Upon the argument of this appeal, the Respondents very properly declined to insist upon the point of delay as an answer to the Appellant's suit. The Master of the Rolls proceeded upon the principle, established by many decided cases, that an allottee, or purchaser of shares in a company, who seeks to divest himself of his shares upon the ground of having been induced to purchase them by misrepresentation, cannot be relieved if he has continued to hold the shares without objection after knowledge, or with the full means of knowledge, of the falsehood by which he has been drawn in to acquire them. These cases proceeded upon the ground of acquiescence, and on the application of a more general principle that an agreement induced by fraud is not absolutely void, but that it is entirely in the option of the person defrauded whether he will be bound by it or not. The suit in the present case is not for the rescission of the contract, but is founded upon the loss the Appellant has sustained, and may sustain, in consequence of his being bound by the contract he has entered into. It is a proceeding similar to an action at law for deceit; and the only amount of delay which could be a bar to relief is fixed by the *Statute of*

(1) Law Rep. 13 Eq. 121.

Limitations, by analogy to which equity generally proceeds in questions of laches.

The questions to be determined upon this appeal are,

Firstly, whether the Respondents ought to be decreed to indemnify the Appellant for the loss he has sustained upon the shares he was induced to purchase by reason of their misrepresentation or concealment of facts material to be known? Secondly, supposing the directors to be liable, whether the remedy of the Appellant extends to the executors of the deceased director, Mr. *Gibb?* Thirdly, whether, as the Appellant was not an original allottee, but a purchaser of shares in the market, any injury he has sustained by becoming a holder of the shares is not too remote to entitle him to relief against the Respondents?

In dealing with the first question, it will not be necessary to enter into a minute detail of the affairs of the firm of *Overend & Gurney*, who had for many years carried on a most extensive business as bill brokers and money dealers, with the highest credit and reputation in the commercial world.

With the exception of the panic year, 1857, their business had, prior to the year 1860, been carried on profitably; but from 1861 to 1865 no profits were divided. This is attributed to a departure from the legitimate business (as it is called) of the firm, by making advances to various persons upon securities of a speculative and uncertain character, these doubtful advances amounting to upwards of £4,000,000 sterling. But even upon bills discounted in the regular course of the legitimate business of the firm during the above four years, there had been losses averaged at £32,532 per annum, but which is said to have included one year (1864) of very unusual pressure. This state of things occasioned great anxiety, and led to a careful investigation of the affairs of the firm; when it appeared from the books that there were outstanding debit balances to the above amount of £4,000,000 and upwards: but it was estimated that of this sum £1,082,000 would be realized; leaving a sum of upwards of £3,000,000 to be provided for. No doubt the firm was in a hazardous condition. Possibly, by care and circumspection in the future management of the business, the affairs might have been brought round. But the partners, as it is said, "after mature deliberation, considered it desirable that the

1873
PEEK
v.
GURNEY.

business should be strengthened by the introduction of fresh capital, and in the result it was determined that such object should be accomplished by the formation of a joint stock company."

It cannot be denied that if the condition of the firm of *Overend & Gurney* had been disclosed the result must have been their stoppage, and no hope could have been entertained of establishing a joint stock company upon the basis of a concern in such a state. The foundation of the projected company was therefore necessarily laid in concealment; and to render the scheme attractive to the public the promoters were not only compelled to hide the truth, but to give such a colour to the statements put forth in the prospectus as to render them (though perhaps literally true), yet, in the sense in which they must have known the statements would be understood by the public, really false.

The arrangement for the establishment of the company was carried out by two deeds, both dated and executed on the 27th of July, 1865, though only one of them was referred to in the prospectus issued on the 12th of July as "the deed of covenant" which might be inspected at the offices of the solicitors of the company.

By this deed the firm of *Overend & Gurney* agreed to sell, and the limited company agreed to purchase, the business of bill brokers and money dealers, for the sum of £500,000; the sum of £250,000, one moiety, to be paid or treated as paid, by being brought into account as being paid, in cash on the day of completion, and the other moiety to be paid, or treated as paid, by the limited company issuing to the firm of *Overend & Gurney* 16,666 shares of £50 each, on which £15 per share were to be treated as paid up, and allowed on account between the vendors and purchasers. And it was agreed that the limited company should be entitled to have the price or sum of £500,000 applied and made available by way of material guarantie in aid of and for the purpose of ensuring the performance of the covenants of the vendors.

The other deed, called the deed of arrangement, was never made known to the public, but was alleged in argument by the Appellant's Counsel to have been studiously concealed. By this deed it was arranged that during a period, called the "suspense period," from the 31st of July, 1865, to the 31st of December, 1868, a

suspense and guarantie account should be opened and debited with the balance of the excepted accounts (meaning the outstanding accounts, debts, liabilities, transactions, matters, affairs, and things connected with the business of the old firm), which the directors of the limited company should deem it desirable or expedient to be wound up, settled, or arranged by the old firm itself.

This suspense and guarantie account was to be credited with £250,000, the moiety of the sum to be paid for the transfer to the limited company of the business of the old firm, and also with the dividends payable in respect of the 16,666 shares, and with all sums of money received upon the sale of any of these shares.

By this deed the complete liquidation of the excepted accounts, which were to be wound up by the old firm, was limited to a period of three and a half years.

In these circumstances, where so much was to be concealed and so much varnished over to tempt the public to join the proposed company, the prospectus was prepared. It was drawn up by *John Henry Gurney*, and discussed and considered by all the persons who were afterwards directors, except Mr. *Barclay*.

It is unnecessary to consider in detail the alterations which were made in the original draft; but one of them appears to me to deserve some attention. In the proposed prospectus there was a statement that the existing liabilities of the old firm which might be taken over by the company would be "most amply and satisfactorily guaranteed." It was suggested that these latter words should be omitted, and their place supplied by the words "under the guarantie of the vendors." And the prospectus accordingly runs thus: "The vendors guaranteeing the company against any loss on the assets and liabilities transferred." This seems to be an indication of the opinion of the intended directors, who knew all the facts, and who, I assume, were desirous of making the statements in the prospectus as conformable to the truth as possible, that they could not truly represent the guarantie of the old firm to be an ample and satisfactory one. It is, however, sufficient to remark that the prospectus was not framed, in the terms in which it was issued, carelessly or inconsiderately, but designedly and after deliberation.

It does not appear that the old firm had at this time lost any of

1873
PEEK
v.
GURNEY.

its estimation with the public, and the well-known name in capitals at the head of the prospectus was likely to possess no inconsiderable attraction.

The prospectus is ushered in with the following statement: "The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. *Overend, Gurney, & Co.* of their long-established business as bill-brokers and money dealers, and of the premises in which the business is conducted, the consideration for the goodwill being £500,000, one half being paid in cash, and the remainder in shares of the company, with £15 per share credited thereon, terms which, in the opinion of the directors, cannot fail to ensure a highly remunerative return to the shareholders." This is followed by the statement already adverted to of "the vendors guaranteeing the company against any loss on the assets and liabilities transferred."

Now, what would be understood by any person reading these representations? Unquestionably that the old firm was a sufficiently flourishing concern for the goodwill of the business to be worth half a million, and that the proposed company, being guaranteed against any loss on the assets and liabilities transferred, the terms agreed upon for the transfer of the business could not fail to ensure a highly remunerative return to the purchasers. At this time the old firm was insolvent to the extent of £3,000,000, and the goodwill of the business was really not worth one farthing.

It is said that every statement in the prospectus is, literally, true; that the sum of £500,000 was actually the sum agreed to be paid as the consideration of the transfer of the business of the old firm; and that the company had really the guarantie of the vendors against any loss on the assets and liabilities of the firm. I am compelled, however, to question even the literal truth of the representation that the consideration for the goodwill was £500,000, one half being paid in cash, and the remainder in shares of the company. This imports, of course, that payment of the £250,000 was to be really made to the partners in the old firm, and the shares to be delivered to them for their own benefit. But so far was this from being the case, that under the deed of arrangement (the deed not referred to in the prospectus), instead of the £250,000 being paid to the partners, it was to be paid to the

limited company, and the suspense and guarantie account was to be credited with that amount in discharge of so much of the liabilities of the old firm; and with regard to the shares (the other moiety of the consideration), all benefit derived from them by the partners in the old firm was to be carried to the credit of the same account. Upon these facts was it true, even in a literal sense, that the consideration for the business was to be paid to the old firm of *Overend & Gurney*, one half in cash and the remainder in shares? If not, then undoubtedly there was a misrepresentation, for which the Respondents would be liable.

But the case must be examined with reference to the charge which is made against the Respondents of having concealed material facts, by which the Appellant alleges that he was deceived and drawn in to the purchase of his shares in the company. It was argued on his behalf that the concealment of material facts which a person is bound to communicate may be the ground of an action for deceit and of a suit for relief in equity. The concealment in the present case was of the all-important fact of the true state of the affairs of the old firm, which, if they had been disclosed, the wildest speculator would have turned away from a proposal to build a company on such a foundation. That there was a moral obligation upon the Respondents not to put forward a scheme which depended for its success upon keeping the public in ignorance, of what ought in fairness to have been made known to them, no one can doubt. It is said that the directors entertained a *bonâ fide* belief that the company would be a prosperous and profitable undertaking, and they evinced the sincerity of their belief by all of them becoming holders of shares to a considerable amount; but they knew that the company could not possibly be upheld without the introduction of fresh capital, and that this fresh capital could only be obtained by concealing the real condition of the old firm; and however they might be convinced that, with additional capital and a careful and prudent management, the affairs of *Overend & Gurney* might be brought round, and afterwards a profitable business be carried on, yet as this was an experiment which was to be made with the money of other persons as well as their own, they were bound to give all those other persons such information as they themselves possessed, to enable a competent

1873
PEEK
v.
GURNEY.

judgment to be formed as to the prudence of joining the proposed company.

The question, however, is not as to the moral obligation of the Respondents, but whether their intentional concealment, from whatever motive, of a fact so material that if it had been made known no company could have been formed, renders them liable to an action for damages, or to the analogous proceeding in equity, by the Appellant, who was led by it to purchase shares in the company, by which he has been subjected to a most serious loss.

This case is entirely different from suits instituted either to be relieved from, or for the enforcement of, contracts induced by the fraudulent concealment of facts which ought to have been disclosed; nor does it resemble such cases as *Burrowes* v. *Lock* (1) and *Slim* v. *Croucher* (2), where a person making an untrue representation to another, about to deal in a matter of interest upon the faith of that representation, has been compelled to make good his representation, whether he knew it to be false, or made it through forgetfulness of the fact. It is a suit instituted to recover damages from the Respondents for the injury the Appellant has sustained by having been deceived and misled, by their misrepresentations and suppression of facts, to become a shareholder in the proposed company, of which they were the promoters. It is precisely analogous to the common law action for deceit. There can be no doubt that Equity exercises a concurrent jurisdiction in cases of this description, and the same principles applicable to them must prevail both at Law and in Equity.

I am not aware of any case in which an action at law has been maintained against a person for an alleged deceit, charging merely his concealment of a material fact which he was morally but not legally bound to disclose. The case of *Keates* v. *Earl Cadogan* (3) may be mentioned as an authority to the contrary. There it was held upon demurrer that an action for deceit would not lie against the owner of a house, who knew it to be in a ruinous and unsafe condition, for not disclosing the fact to a proposed tenant, who wanted the house for immediate occupation. In the course of the argument a case of *Hill* v. *Gray* (4) was cited, where the agent for

(1) 10 Ves. 470.
(2) 1 De G. F. & J. 518.
(3) 10 C. B. 591.
(4) 1 Stark. 434.

1873
PEEK
v.
GURNEY.

the sale of a picture, knowing that the vendee laboured under a delusion (as it is called) that the picture was the property of Sir *Felix Agar*, did not remove it, and Mr. *Gray*, under this misapprehension, purchased the picture. Lord *Ellenborough*, upon proof of these facts, said: "The case has arrived at its termination, since it appears that the purchaser laboured under a deception, in which the agent permitted him to remain, on a point which he thought material to influence his judgment." It is to be observed that *Hill* v. *Gray* was not an action for deceit, but was brought by the owner of the picture against the purchaser upon the contract; and Chief Justice *Jervis*, in his judgment in *Keates* v. *Earl Cadogan* (1), took some pains to shew that there was something more in the case than mere concealment, and what amounted (as he called it) to aggressive deceit on the part of the agent of the seller. After quoting the following words of Lord *Ellenborough*: "The agent ought not to have let in a suspicion on the part of the purchaser which he knew enhanced the price; he saw that the Defendant had fallen into a delusion in supposing the picture to be Sir *Felix Agar's*, and yet he did not remove it," he added, "That shews something like an act done." It may be questionable whether this effect could properly be given to the silence of the agent; but the attempted explanation shews the anxiety of Chief Justice *Jervis* to reconcile *Hill* v. *Gray* with the judgment of the Court in the case before it—that the mere non-disclosure, by the owner of the house, of its ruinous state was no ground for an action for deceit.

Assuming that mere concealment will not be sufficient to give a right of action to a person who, if the real facts had been known to him, would never have entered into a contract, but that there must be something actively done to deceive him and draw him in to deal with the person withholding the truth from him, it appears to me that this additional element exists in the present case. The concealment of the insolvent state of the old firm of *Overend & Gurney* was absolutely essential towards the formation of the limited company, and the Respondents not merely were silent as to this important fact, but actively represented that the firm was in such a flourishing condition that the goodwill of the business was worth half a million. It is said that the prospectus is true as

(1) 10 C. B. 591, 600.

1873
PEEK
v.
GURNEY.

far as it goes, but half a truth will sometimes amount to a real falsehood; and I go farther and say, that to my mind it contains a positive misrepresentation. The language of the prospectus must be read in the sense in which the Respondents must have known it would be understood. In that sense it is not true (as already observed) that the sum of £500,000, the consideration for the business, was paid to the old firm in cash and in shares; for the whole of it was to be applied in liquidation of the enormous debt of that firm, the existence of which was designedly kept from the public, to whom the prospectus was addressed. I cannot doubt that there was, beyond the passive concealment of the state of the affairs of the old firm, an active misrepresentation of the truth by the Respondents, for which they were answerable either at Law or in Equity.

It is hardly necessary to consider the separate case of Mr. *Henry Ford Barclay*, which was disposed of by the observations made in the course of the argument on his behalf. It was contended that he was not liable for any misrepresentations in the prospectus, as he never took any part in preparing or issuing it, or gave any express authority to prepare or issue it, and never saw the prospectus till after it was issued and sent to him, or read it till after the stoppage of the company.

But the short answer to his defence is, that he was acquainted with all that the other directors knew; he consented to become a director knowing that a prospectus would, as a matter of course, be issued; he signed the memorandum and articles of association referred to in the prospectus; and upon receipt of the prospectus he filled up and signed the form of application for shares, printed with and forming part of the prospectus. Can he, upon these facts, be heard to say that he did not authorize the prospectus or sanction its publication?

The second question is, whether if the Appellant is entitled to maintain his suit against the Respondents, his remedy extends to the executors of the deceased director, Mr. *Gibbs*? On their behalf it is contended that this is a proceeding to recover damages for a wrong done, and that the maxim *actio personalis moritur cum personâ* applies.

There can be no doubt that if an action at law had been brought

1873
PEEK
v.
GURNEY.

by the Appellant instead of this proceeding in equity, the executors could not have been made liable; and in the exercise of a concurrent jurisdiction by Courts of Law and Equity, both Courts (as already intimated) ought to proceed upon the same principles.

Now this is not like the cases referred to in argument of the *Bishop of Winchester* v. *Knight* (1) and the *Marquis of Lansdowne* v. *Marchioness of Lansdowne* (2), where the wrong complained of benefited the estate of the testator, and on that account the executors were made liable. The same liability arises and on the same ground in Courts of Law. As Lord *Mansfield* said in *Hambly* v. *Trott* (3): "Where property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As, for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees, he shall."

Mr. *Gibbs'* estate derived no benefit from the misrepresentation to which he was a party, and therefore his executors, who can only be answerable for his acts in respect of his estate, cannot be made liable for the wrong done to the Appellant.

The learned counsel for the Appellant was asked in the course of the argument whether there was any case in which equity had made personal representatives liable for damages, for a personal wrong, which might have been obtained against their testator. To which no satisfactory answer was given.

The cases mentioned in argument, where executors were made answerable for the acts of their testator out of his estate, were, none of them, simply questions of damages. *Ingram* v. *Thorp* (4) was a case like *Burrowes* v. *Locke* (5) and *Slim* v. *Croucher* (6), where the testator was party to an agreement charging certain property to the extent of £1500 for the benefit of the Plaintiff, and had represented that the property was an ample security in value, whereas the property was heavily incumbered and insufficient; and Vice-Chancellor *Wigram* held that the Plaintiff

(1) 1 P. Wms. 407.
(2) 1 Madd. 116.
(3) Cowp. 376.
(4) 7 Hare, 67.
(5) 10 Ves. 470.
(6) 1 De G. F. & J. 518.

1873
PEEK
v.
GURNEY.

was entitled to say to the owner of the property: If I pay £1500 upon a representation falsely made by you, that the estate you gave as a security for it is worth £2500 more than it was in truth worth, you shall make good your representation out of the property, so far as it will extend, and if it shall be insufficient, then out of your other assets." So that the executor may be said to have taken the estate with the liability to make good his testator's representation out of it.

Walsham v. *Stainton* (1) was a case which proceeded upon a different principle. There *Joseph Stainton* and *Henry Stainton*, who were the confidential agents of a partnership, combined together to obtain for themselves the shares of the partners in the concern at an under value by keeping the accounts of the partnership fraudulently, so as to conceal from the partners the true value of the shares. *Joseph* was a party to the fraud, but the whole benefit of it accrued to *Henry*. The suit was instituted against the personal representatives of both *Joseph* and *Henry*. The executor of *Joseph* demurred to the bill for want of equity, but the Lords Justices held that both *Joseph* and *Henry* stood in a fiduciary position to the partnership, and that both having concurred in a breach of duty, although only one of them derived benefit from the fraud, the other was liable in equity for the benefit so derived, and that consequently the liability attached to his personal representative as if his own estate had been benefited (2).

The case of *Rawlins* v. *Wickham* (3) was not a suit to obtain damages from executors, but was brought against them to set aside, on the ground of fraudulent misrepresentation, a contract of partnership entered into between the Plaintiff and *James Wickham*, the testator, and to obtain a decree for the Defendants to indemnify the Plaintiff against the liabilities of the firm. An action at law had been brought against *Wickham* and *Bailey*, on the ground of the fraudulent misrepresentation. *Wickham* died before the declaration was delivered. The action proceeded against *Bailey* alone, and the Plaintiff obtained a verdict. The damages were referred

(1) 1 De G. J. & S. 678. 9 Jur. N.S. 261
(2) *See Imperial Mercantile Credit Association* v. *Coleman & Knight*, Law Rep. 6 H. L. 189.
(3) 3 De G. & J. 304. 5 Jur. N.S. 279

to arbitration, and the arbitrator awarded a sum of £11,800, but owing to *Bailey's* circumstances only a sum of £300 was obtained. It may be doubted whether, looking to the nature of the suit, the rule of *actio personalis*, &c., applied. At all events the question was never raised, and the Lords Justices held that the action brought against *Bailey*, which was urged as an objection to the suit, did not free the estate of the deceased from its liability in equity, where alone the estate could be reached, but that whatever might be obtained under the judgment in the action against *Bailey* should go in relief of *Wickham's* estate.

No case has been produced, and I assume that none can be found, in which, upon a claim against a testator *ex delicto*, executors have been held liable in Equity to answer for it in damages. And it appears to me that it would be contrary to principle to hold that an action which in a Court of Law would be held to die with a testator, should be maintainable against executors in a Court of Equity of concurrent jurisdiction. In my opinion whatever might be the case as to the other Respondents, the executors of Mr. *Gibb* could not have been made liable in the present suit.

The last question to be considered is, whether the Appellant, who alleges that he purchased his shares upon the faith of the prospectus, has a remedy against the Respondents for the misrepresentations which it contains. The Appellant contends that the prospectus being addressed to the public for the purpose of inducing them to join the proposed company, any one of the public who is led by it to take shares, whether originally as an allottee, or by purchase of allotted shares upon the market, is entitled to relief against the persons who issued the prospectus. The Respondents on the other hand insist that the prospectus, not being an invitation to the public ultimately to become holders of shares, but to join the company at once by obtaining allotments of shares, those only who were drawn in by the misrepresentations in the prospectus to become allottees, can have a remedy against the Respondents.

There can be no doubt that the prospectus was issued with the object alleged by the Respondents. It is addressed from the temporary offices of the company for allotment and registration of shares. It states how much is to be paid upon application for

1873
PEEK
v.
GURNEY.

shares, and how much upon allotment, and how and where the application for shares is to be made; and it gives the form of payment to the bankers and of the receipt to be given by them to the applicant for shares to be allotted.

But the learned counsel for the Appellant, not denying the original purpose of the prospectus, contended, upon the authority of decided cases, that the prospectus, having reached the hands of the Appellant, and he, relying upon the truth of the statement it contained, having been induced to purchase shares, the Respondents were liable as for a misrepresentation made to him personally. I must, therefore, examine shortly the authorities relied upon.

Bedford v. *Bagshaw* (1) is a case where the Defendant and others, forming the board of management of a joint stock company, for the purpose of getting the shares of the company inserted in the official list of the *Stock Exchange*, untruly represented that two thirds of the scrip had been paid upon. The shares being in consequence of that representation inserted in the official list, the Plaintiff, knowing the requirements of the *Stock Exchange*, on the faith that two-thirds of the scrip had been paid upon, purchased shares in the company. The jury found that the representation was made fraudulently. The Court of Exchequer held that the Defendant was liable to the damages sustained by the Plaintiff, although the representation was not made to him directly. Two of the learned Judges, Barons *Martin* and *Bramwell*, considered the case to be concluded by a former decision in a case of *Seymour* v. *Bagshawe* (2) against the same Defendant. The proceedings in that case, however, hardly appear to recommend it as an authority. The action was tried by Lord Chief Justice *Jervis*, who told the jury that if the Plaintiff was induced, by seeing the shares quoted in the official list of the *Stock Exchange*, to purchase them, and if they believed that the insertion of the shares in the list was procured by the false and fraudulent representation of the Defendant, the Plaintiff was entitled to recover. A bill of exceptions was tendered to the Chief Justice's ruling. In the Exchequer

(1) 4 H. & N. 538; 29 L. J. (Ex.) 59, in a note to which (p. 62, n.) latter report is to be found the only report of the case of *Scott* v. *Dixon* (Q. B., H. T. 1859).

(2) 18 C. B. 903; 29 L. J. (Ex.) 62, n.

Chamber judgment was pronounced by consent without argument, for the purpose of going at once to the House of Lords. This is stated in the Common Bench Reports (1), but Baron *Bramwell*, in the Exchequer Reports, says (2) that the judgment in the Exchequer Chamber did not pass *sub silentio* (3). No other trace, however, of the manner in which the case was disposed of is to be found, except in the short notice of it in the Common Bench Reports. On the case being called on in the House of Lords, the counsel for *Bagshaw*, the Plaintiff in Error, said he did not think he could usefully occupy the time of the House by arguing it, and he at once submitted to a judgment for the Defendant in Error. How, under these circumstances, this case could be considered as a conclusive authority by the Judges who decided *Bedford* v. *Bagshaw* it is hard to understand. But the cases themselves cannot, in my opinion, be supported. The actions were brought upon the allegation of a false representation made to the Plaintiff. But no representation at all was made which reached either his eyes or his ears. From his knowing the rules of the *Stock Exchange* he assumed that a certain representation had been made, and acted upon it. According to the judgment, it was his knowledge of the rules which led him to appropriate the representation to himself, and therefore it could not be taken to be made to any one who was ignorant of these rules. The decisions, and the grounds on which they proceeded, appear to me to be extraordinary, and I cannot bring my mind to agree with them.

In *Scott* v. *Dixon* (4), which is to be found in the note to the case of *Bedford* v. *Bagshaw*, an action was brought against a director of a banking company for falsely, fraudulently, and deceitfully publishing and representing to the Plaintiffs that a dividend was about to be paid out of the profits, which were sufficient for

(1) 18 C. B. 903.

(2) 4 H. & N. 547–8.

(3) But see the fuller report in 29 L. J. (Ex.) 64, where the words of the learned Baron are: "*I have got a very strong impression upon my mind* that the judgment of the Court of Exchequer did not pass *sub silentio*." Baron *Martin* had previously said that the "parties did not think fit to argue it, and therefore the judgment was affirmed." The apparent difference probably arose thus, the Counsel did not argue the question, but the Judges, among themselves, might have discussed it.

(4) 29 L. J. (Ex.) 62, n., to the case of *Bedford* v. *Bagshaw*.

1873
PEEK
v.
GURNEY.

payment of the dividend, and that the shares were a safe investment for the money. The Plaintiffs bought their shares upon the faith of a report made by the directors to the shareholders which contained the false representations. Copies of this report were left at the bank, and were to be had by sharebrokers or any persons applying for it, who were desirous of information with regard to the affairs of the bank, with a view to the purchase of shares. The Plaintiffs purchased at the bank, through their broker, a copy of the report. The Court of Queen's Bench held that there being positive evidence that the report was to be bought by any person who thought of becoming a purchaser of shares, and that it came into the hands of the Plaintiffs in this manner, and by the perusal of it they were induced to buy shares in the bank, there was a publication to the Plaintiff in the sense of the declaration. I do not doubt the propriety of this decision. The report, though originally made to the shareholders, was intended for the information of all persons who were disposed to deal in shares; and the representation must be regarded as having been made not indirectly, but directly to each person who obtained the report from the bank where it was publicly announced it was to be bought, in the same manner as if it had been personally delivered to him by the director.

30 Ch D 731

Gerhard v. *Bates* (1) is supposed to be an authority in support of the argument, that a prospectus containing untrue representations may be made the ground of an action by a purchaser of shares, who has been deceived and induced by the representations to become a shareholder. That case, however, establishes no such proposition, but rather, as I read it, the contrary. The question arose upon a demurrer to a declaration, upon which of course all the facts alleged were, for the purpose of the argument, taken to be true. The second count of the declaration, which was founded upon the deceitful representation by the Defendant, alleged that the Defendant and others had formed a company with 96,000 shares, of which 12,000 were to be appropriated to the public at 12*s.* 6*d.* per share, free from farther calls; that the Defendant being the promoter and managing director of the company, intending to defraud, deceive, and injure the public who might become pur-

(1) 2 El. & Bl. 476, 489–490.

17 Jan 1098

1873
PEEK
v.
GURNEY.

chasers of the 12,000 shares, and to induce them to become purchasers, falsely, &c., caused it to be publicly advertised, by a prospectus issued by the Defendant as such director, that the promoters did not hesitate to guarantee to the bearers of the 12,000 shares a minimum annual dividend of 33 per cent., &c., and that the Defendant by means of false, &c., pretences and representations, wrongfully and fraudulently induced the Plaintiff to become, and the Plaintiff by reason thereof actually became, purchaser and bearer of 2500 of the 12,000 shares at 12*s.* 6*d.* per share; whereas the statement was false and fraudulent to the knowledge of the Defendant; and the Defendant had no ground for offering such guarantie to the public. Lord *Campbell*, in giving judgment for the Plaintiff, said: "Had it been alleged that the Defendant meaning to deceive and injure the Plaintiff, and to induce him to purchase shares in the company under the belief that it was a safe and profitable undertaking, fraudulently delivered to the Plaintiff the prospectus containing the false representation, whereby the Plaintiff was induced to purchase the shares, there can be no doubt that the count would have been sufficient. The allegations which it does contain appear to us to be equivalent." And he afterwards adds, "if the Plaintiff had only averred that having seen the prospectus he was induced to purchase the shares, objection might have been made that a connection did not sufficiently appear between the act of the Defendant and the act of the Plaintiff from which the loss arose;" a remark which has a direct application to the present case.

The case of *Gerhard* v. *Bates*, therefore, is no authority for holding that, upon a prospectus addressed to the public by the directors of a company, any one of the public who, at any time and under any circumstances, has been led to take shares upon the faith of the representations thus published can maintain an action against them. The observations of Lord *Campbell* rather indicate a contrary opinion. It appears to me that there must be something to connect the directors making the representation with the party complaining that he has been deceived and injured by it; as in *Scott* v. *Dixon*, by selling a report containing the misrepresentations complained of to a person who afterwards purchases shares upon the faith of it, or as suggested in *Gerhard* v. *Bates*, by delivering the fraudu-

1873
PEEK
v.
GURNEY.

lent prospectus to a person who thereupon becomes a purchaser of shares, or by making an allotment of shares to a person who has been induced by the prospectus to apply for such allotment. In all these cases the parties in one way or other are brought into direct communication; and in an action the misrepresentation would be properly alleged to have been made by the Defendant to the Plaintiff; but the purchaser of shares in the market upon the faith of a prospectus which he has not received from those who are answerable for it, cannot by action upon it so connect himself with them as to render them liable to him for the misrepresentations contained in it, as if it had been addressed personally to himself. I therefore think that the Appellant cannot make the Respondents responsible to him for the loss he has sustained by trusting to the prospectus issued by them inviting the public to apply for allotments of shares; and upon this ground only (being different from that on which the Master of the Rolls proceeded) I submit to your Lordships that the decree appealed from should be affirmed.

LORD COLONSAY:—

My Lords, I agree in the result at which my noble and learned friend has arrived. We must take this case upon the footing upon which it is presented to us, not of a guarantie, but of a transfer or purchase of shares; and we must look at the allegation of the purchaser, that he was misled by certain statements which were contained in the prospectus issued by the Respondents. Now, my Lords, I think with my noble and learned friend that this prospectus did suppress important matter, and if it did not contain any direct allegation of what was false, it was at least of a misleading character. It was a *suppressio veri*, which, if it did not amount to an *allegatio falsi*, at least amounted to a *suggestio falsi*, and I cannot see any grounds upon which I could justify it.

I think that there is very great difficulty in distinguishing the cases of the different Defendants, or Respondents, from each other Those who were concerned in issuing that prospectus can hardly be listened to when they say that they did not know what were the contents of it, or that they had not sufficiently examined into the

matter before putting it forth. That would be a reckless putting forth of statements which they did not know to be true, and which were calculated to induce people to subscribe.

But, my Lords, that does not solve this case. I agree in the view taken by the Respondents' counsel that the proper office of a prospectus is to invite persons to become original partners in a company, that is to say, allottees of shares; and I do not think that the responsibility towards those allottees which attached to the directors who issued the prospectus, followed the shares when they were transferred to any number of persons however distant from the allottees, persons who ultimately purchased those shares. I think that the office of the prospectus was fulfilled when the allottee got his shares as far as regarded those shares. I think farther, that in a case of this kind it is necessary to make out some direct connection between the directors and the party who alleges that he was deceived.

I do not find that any of the authorities that have been cited support the opposite view of the matter. I shall only notice one of those cases with which I happen to be familiar. I mean the case of *Cullen* v. *Thompson* (1). That was a case not at all in point with the present. In the first place, the question that came to this House in that case was a question whether the manager and the accountant of a bank, as being servants of the directors, were personally liable for the false allegations contained in a report. The Court below had been of opinion that the directors were responsible, but that there was not, in a very confused record, sufficient issuable matter to be sent to trial as against the officials. This House thought otherwise. We thought that there might be extracted from the record, confused as it was, sufficient issuable matter, and we sent back the case to the Court below accordingly. But what were the facts as regards Mr. *Cullen*, and what was the ground upon which that case proceeded? Mr. *Cullen* was an original proprietor and allottee of shares, and being, as such, a partner in the company, and being present at a meeting of the company to receive a report of the directors, that report was read to him and to others, and it was transmitted to him and to others who were shareholders. And, not only so, but upon some inquiry

(1) 4 Macq. Sc. Ap. 424.

1873
PEEK
v.
GURNEY.

of his there was a letter written and a circular sent to the shareholders containing all those misrepresentations and misstatements upon which he founded his case. In consequence of these misrepresentations, he purchased 170 additional shares, and afterwards brought his action against the directors for having communicated to him this false statement, and he claimed to hold them liable in damages for it. So far from that being in point with a case of a party having no such communication made to him, and yet making such a claim, it is the very reverse. It is the case of a party who had a most direct and positive representation made to him by the directors, against whom, therefore, he was entitled to institute proceedings.

I do not find, as I have said, that there is any case which supports the conclusion that the Appellant seeks to arrive at in this case, according to the very clear and very ingenious speech that was presented to us on his behalf. Therefore, my Lords, I concur in the judgment which has been proposed by my noble and learned friend.

LORD CAIRNS:—

My Lords, this case was argued at your Lordships' Bar very elaborately and with great ability; but the points of the case upon which the decision of your Lordships must, as it seems to me, turn, lie in a very small compass.

I agree with my noble and learned friends who have preceded me, that the delay in instituting this suit is not a ground upon which the judgment of the Master of the Rolls can be supported. The suit is in the nature of an action for damages for misrepresentation; it is in the nature of an action or proceeding *ex delicto*, and it appears to me that to such an action or proceeding there is no bar arising from delay, unless the delay be such as would bring the *Statute of Limitations* applicable to the case into operation.

The two questions, my Lords, which, as it appears to me, it is material to answer are these:—First, did the Respondents, in the prospectus issued as to the company, make representations which in point of fact were untrue? And, secondly, is the Appellant able to connect himself with these representations so as to enable

him to say that they were made to him, or were made to induce him to act on them, and that he did so act?

My Lords, I have limited the first question to the prospectus, because that is really the only matter to which your Lordships need direct your attention; nothing else is relied upon in the bill as a ground for relief. It is true that a good deal was said during the argument about the proceedings taken to obtain a settling-day on the *Stock Exchange;* but although the obtaining of a settling-day on the *Stock Exchange* is mentioned in the pleadings, it is not made any ground for relief. Your Lordships will observe, that in the 39th paragraph of the bill it is stated that "The Plaintiff made the purchases of shares and entered into the contracts of membership solely on the faith of the statements contained in the prospectus." That allegation excludes any reference to any other alleged misstatement. It is impossible to say, and it would be impossible to say, even though the pleadings had been different, that anything that passed with the committee of the *Stock Exchange* was, in this case, a representation either made to the Appellant or made for the purpose of being communicated to the Appellant.

This brings me, therefore, to the consideration of the prospectus; and before looking at the terms of it, I may say that I entirely agree with what has been stated by my noble and learned friends before me, that mere silence could not, in my opinion, be a sufficient foundation for this proceeding. Mere non-disclosure of material facts, however morally censurable, however that non-disclosure might be a ground in a proper proceeding at a proper time for setting aside an allotment or a purchase of shares, would in my opinion form no ground for an action in the nature of an action for misrepresentation. There must, in my opinion, be some active misstatement of fact, or, at all events, such a partial and fragmentary statement of fact, as that the withholding of that which is not stated makes that which is stated absolutely false.

Now, my Lords, this prospectus is certainly free from many of those extravagant terms and flattering descriptions which we are accustomed to see in documents of this kind. I will not dwell upon the words that the terms made, "in the opinion of the directors cannot fail to ensure a highly remunerative return to the

1873
PEEK
v.
GURNEY.

shareholders." That was a reference, not to fact, but to opinion; and, strange as it may appear to us now, looked at by the light of subsequent events, I am not satisfied that this statement as to the opinion of the directors was not perfectly consistent with the opinion which they really held. I do not dwell upon any of the later sentences in the prospectus, and the only two sentences to which I will direct your Lordships' attention are the first and the second.

The first sentence runs thus: "The company is formed for the purpose of carrying into effect an arrangement which has been made for the purchase from Messrs. *Overend, Gurney, & Co.* of their long-established business as bill brokers and money dealers, and of the premises in which the business is conducted; the consideration for the goodwill being £500,000, one half being paid in cash, and the remainder in shares of the company with £15 per share credited thereon." Now, it appears to me that any person reading that statement would be entitled to say, "Here is a company, with the name of which we are quite familiar, and here are new directors, persons of known wealth and character in the commercial world, joining that company for the purpose of making a new and limited partnership. They are independent of the old partnership, and able to form an independent judgment upon it; they are going to put in fresh capital themselves, and we understand from this statement that there is to be a transfer of the assets and liabilities of the old concern—the whole business as a going concern is to be taken over. We, the outside public, have no opportunity of looking into the accounts of the old concern, but these new directors have done so, and, having looked into the accounts and estimated the relative value of assets and liabilities, they think that the whole business upon this footing is worth a sum, for the goodwill of it, of half a million of money. One half of that amount is to be paid down and taken away by the old partnership; the other half is to be given by the old partnership as so much capital in the new concern." My Lords, in this point of view, which, as it appears to me, is the point of view in which, I repeat, any member of the outside public might regard and understand this statement, the payment of so large a sum for the goodwill of the concern, the actual payment of half, and the actual

assignment of the other half by way of capital, would become a material guarantie that the bargain was, at all events in the opinion of those who made it, a good and sound bargain.

But, my Lords, in order to understand the full meaning of this statement, your Lordships must take into account the second sentence in the prospectus also: "The business will be handed over to the new company on the 1st August next, the vendors guaranteeing the company against any loss on the assets and liabilities transferred." I read that again as meaning, consistently with the sentence which I read in the first instance, that there is to be a transfer of all the assets and all the liabilities; that the business (to use the expression I used before) is to be transferred as a going concern, and is to be transferred at a value which is placed at half a million of money, on the basis of all the assets and liabilities being made over, and a guarantie given, on the part of the old partners, that whatever valuation was put upon the assets and liabilities was a valuation which would be secured by them and made good by them; so that on the one hand the assets would not be deficient, and so that, on the other hand, the liabilities would not be excessive, as compared with the valuation which had been put upon both. In point of fact, the sentences which I have read to your Lordships appear to me to represent what I may term an out-and-out transaction; the business transferred, the money paid, and a sum assigned for the goodwill upon the footing of a transaction of that kind.

Now, my Lords, were these the facts of the case? I will contrast with this statement in the prospectus the statement of the real transaction, which I will take, for brevity, from the case of the Messrs. *Gurney*, now laid before this House. In the case of *Gurney and Birkbeck* (1) I find this statement, which is entirely in accordance with the evidence, and is in point of fact a summary of it: "Under these circumstances, the scheme of the proposed joint stock company was that it should purchase the goodwill of the bill broking and bill discounting business carried on by *Overend, Gurney & Co.*, which was of a most profitable character, for £500,000," Observe, my Lords, even in that sentence there is a complete alteration, a complete departure from the prospectus:

(1) Page 8 of that case.

1873
PEEK
v.
GURNEY.

"That it should purchase the goodwill of the bill broking and bill discounting business;" a distinction being drawn in those words between that portion of the business and the portion of the business which was not described as bill broking and bill discounting, as indeed the case goes on to explain: "That it should purchase the goodwill of the bill broking and bill discounting business carried on by *Overend, Gurney & Co.*, which was of a most profitable character, for £500,000, and that the doubtful accounts" (a matter altogether separate), "which made up the said sum of £4,194,000, should not be transferred, but should be excepted out of the assets made over to the company; and should be retained and wound up by the vendors, and that all sums of money received therefrom, and all other sums of money payable by the company to the vendors, (including the said sum of £500,000, which was payable half in cash and half in shares), should be applied towards the liquidation of the amount of the excepted accounts, with which the vendors were to be debited in the books of the company under the head of suspense and guarantie account." Here I may point out that that is a wholly different transaction. That is a transfer not of the business, but of a portion of the business which is described as a profitable part, namely, the bill broking and bill discounting. There is a separation from that portion of the business of other businesses which had resulted in doubtful accounts to the amount of £4,194,000, which doubtful accounts were not transferred to the new company, but made the subject of a separate piece of book-keeping, involving the non-transfer of them, and in that separate book-keeping the sum of £500,000 was applied on the opposite side of the account.

At another part of the case (1), your Lordships will find a succinct statement of the deed No. 2, which is the deed that gave effect to this part of the arrangement: The deed (No. 2) regulated the details of the arrangement contemplated by the 16th clause of the deed No. 1, and provided for the liquidation of the accounts which, by virtue of that arrangement, were excepted from the accounts of *Overend, Gurney & Co.* transferred to the limited company. It, in effect, provided that a separate account to be called "*Overend, Gurney & Co.*'s suspense and guarantie account"

(1) *Gurney and Birbeck's* Case, page 14.

should be opened in the books of the limited company, and should be debited with the total amount of the balance which, as struck on the 31st of July, 1865, should appear to the debit of the accounts specified in the schedule" (which I may say were the accounts amounting to upwards of four millions), and be credited with £250,000 (being one moiety of the price of the goodwill) and also with £45,000, the price of the business premises of the firm and the balances due to the partners on their private accounts, and the amount from time to time realized by the sale of the shares which were issued to the vendors as part of the said purchase-money. The account was to be closed on the 31st of December, 1868, when the balance, if on the credit side, was to be paid by the company to the members of the firm within a month, and if on the debit side to be deemed a debt due to the company from the firm. So that, I may say in passing, if by any accident, which was a most improbable contingency, these accounts had turned out, not hopeless, but accounts from which a larger sum than was expected should be realized, the benefit of it was to go, not to the new limited company, but to the old partners: It gave to the company a lien on the 16,666 shares to be issued in payment of one moiety of the purchase-money of £500,000, and on all property retained by the firm, to be applied in winding up the excepted accounts, and the company was to be entitled to have the shares and property made available, through the medium of a sale or otherwise, to secure the performance of the vendors' covenants and to indemnify the company.

Now, my Lords, to complete the narrative of this arrangement I must also read to your Lordships a statement with regard to it from the answer of Mr. *John Henry Gurney* (1). He says, in paragraph 6: "In the investigation of the state of the affairs of *Overend, Gurney, & Co.*, prior to the formation of the limited company, it appeared from their books that there were then outstanding various debit balances, which were considered to be of a doubtful nature, to the amount of £4,199,000, or thereabouts; but upon a careful estimation of the securities held in respect of them, and the probable winding-up of such of them as were not secured, it was estimated that of the total amount of £4,199,000 the sum

(1) Joint Appendix, page 81.

1873
PEEK
v.
GURNEY.

of £1,082,000 would be realized, leaving therefore the sum of £3,117,000 still to be provided for. At this period it was estimated that the balances to the credit of the partners, when made up in the private ledger, would amount to £940,000, and which balances had been calculated as liabilities of the firm; but, deducting the amount thereof from the balance of £3,117,000 so left unprovided for, there remained the sum of £2,177,000 still outstanding and to be provided for. Upon a careful examination and estimate of the private estates of the several partners comprising the firm of *Overend, Gurney, & Co.*, and of their interest in the banking business carried on in *Norfolk* and elsewhere, it was estimated that such several private estates would produce the farther aggregate sum of £2,320,000; and after taking credit for the £500,000 to be received for goodwill, and for £45,000 as the estimated value of the premises in *Lombard Street*, there would have remained a surplus of £688,000 in favour of the individual partners after providing for every liability of the firm of *Overend, Gurney, & Co.*"

My Lords, the result of these statements appears to me to be obvious. There was nothing paid for the goodwill of the firm; there was no transfer of assets and liabilities as something which, upon a proper valuation, were worth paying for in the shape of goodwill, with an independent guarantie from the old partners that those assets and liabilities would produce the amount at which they were valued. The principle of the valuation proceeded upon this—that if all the assets and all the liabilities were looked at there was an enormous deficiency. The mode in which that deficiency was made up was this: The accounts, amounting to upwards of £4,000,000, which caused the deficiency, were not really transferred; they were carried to a separate suspense account by themselves, and upon the other side of that account, or for the purpose of balancing the admittedly disastrous outcome of those accounts, there was taken into account the value of the private estates of the partners (upon which I must observe at the same time that no security whatever binding those estates was taken), and there was taken into account also the £500,000, the sum which had been fixed upon as the estimated value of the goodwill. In point of fact, therefore, your Lordships will observe that the use that was

1873
PEEK
v.
GORNEY.

made of the private estates and of the sum named for the goodwill was to fill up that vacuum of insolvency which was apparent on the mere statement of the figures to which I have referred, and that, so far from any sum being paid for goodwill, nothing was paid whatever, and so far from the sum named for the goodwill being a test of the excellence of the bargain, it was exactly the opposite, because, upon the same principle as this sum of £500,000 was appropriated in the manner that I have mentioned, had the insolvency been greater, had there been £500,000 more of insolvency, the value of the goodwill might have been estimated at a million, and the million might have been used in the same way that the £500,000 were used.

Now, my Lords, I have stated shortly the facts as they present themselves to my mind, and I am bound to say that, now that we know these facts, and now that we compare these facts with the statement in the first two sentences of the prospectus, I am unable to arrive at any other conclusion than this—that the statement in those two first sentences was a statement of that which was not justified by the facts of the case.

My Lords, we were pressed very much in argument with considerations as to the motives of those who made this statement, and it was pointed out with great accuracy that upon a trial in the nature of a criminal proceeding it had been held that they were not chargeable with that which was laid to their charge in that proceeding. My Lords, I must say that, so far as I understand the case, I entirely agree with the result at which the jury arrived in that proceeding; and, strange as it may appear, I think there is a great deal in the papers before your Lordships to shew that the gentlemen who formed this company were themselves, judging by the extent to which they embarked their means and continued their property in the concern, labouring under the impression that this transaction, disastrous as it ultimately turned out, had in it the elements of a profitable commercial undertaking; and so far as motive is concerned they may be absolved from any charge of a wilful design or motive to mislead or to defraud the public. But in a civil proceeding of this kind all that your Lordships have to examine is the question, Was there or was there not misrepresentation in point of fact? And if there was, however innocent the

1873
PEEK
v.
GURNEY.

motive may have been, your Lordships will be obliged to arrive at the consequences which properly would result from what was done.

But now, having answered the first question as I am obliged to answer it, I come to the second question in the case, namely, How does the Appellant connect himself with this statement? The prospectus was issued on the 12th or 13th of July, 1865, and a copy was received or was obtained by the Appellant. It is not proved from whom he obtained it. The object of the prospectus on the face of it is clearly to invite the public to take shares in the new company. The prospectus is, as is usual in such cases, an invitation, and there is appended to it a form of application for shares, which was to be filled up, and upon which form the invitation was to be answered. It is a prospectus in this shape, addressed to the whole of the public, no doubt, and any one of the public might take up the prospectus and appropriate it in that way to himself by answering it upon the form upon which it is intended by the prospectus that it should be answered. The Appellant, however, did not take up and did not appropriate the prospectus in this way. For reasons which it is unnecessary to inquire into he declined to take, or at all events he did not originally take any shares in the company. The allotment of shares began on the 24th of July; it appears to have been completed on the 28th of July; and it is stated that two or three times the number of shares to be had in the company were applied for. The allotment having been completed, the prospectus, as it seems to me, had done its work; it was exhausted. The share list was full; the directors had obtained from the company the money which they desired to obtain. The Appellant subsequently, upon the 17th of October, several months afterwards, bought 1000 shares at a premium of something over £7, and again, still later, on the 6th of December, he bought 1000 other shares at a premium of something over £6. He bought them on the *Stock Exchange*, and he, of course, did not know in the first instance from whom he bought them. In point of fact, it appears that as to the greater part of them they were shares which had originally been allotted to one of the old partners, *Samuel Gurney*, by whom they were transferred to a nominee for himself, in whose name they were registered; they were

then sold upon the market, and re-sold apparently several times, because the premium seems to have risen from a much smaller to a much larger sum, and ultimately they were sold, at the premium which I have stated, to the Appellant, and were registered in his name.

Now, my Lords, I ask the question, How can the directors of a company be liable, after the full original allotment of shares, for all the subsequent dealings which may take place with regard to those shares upon the *Stock Exchange?* If the argument of the Appellant is right, they must be liable *ad infinitum*, for I know no means of pointing out any time at which the liability would, in point of fact, cease. Not only so, but if the argument be right, they must be liable, no matter what the premium may be at which the shares may be sold. That premium may rise from time to time from circumstances altogether unconnected with the prospectus, and yet, if the argument be right, the Appellant would be entitled to call upon the directors to indemnify him up to the highest point at which the shares may be sold, for all that he may expend in buying the shares. My Lords, I ask, is there any authority for this proposition? I am aware of none.

During the course of the argument I took the liberty of putting to the learned counsel for the Appellant a case which I think was not answered, and to which, so far as I know, no answer can be given that would be favourable to the Appellant. I put the case of a person having built a house and desiring to sell it. He comes to me and wishes me to purchase it; he describes it as a highly advantageous purchase, and makes statements of fact to me with regard to the house which are untrue and are misrepresentations; but I decline to purchase, and our overtures come to an end. He subsequently sells it to some other person, upon what terms I know not. That other person completes the purchase, and that other person, desiring to raise money on mortgage, applies to me to lend him money. I lend him money upon a mortgage of the house. The facts stated to me originally turn out to be untrue, and are so material as that the house, not being as represented, becomes comparatively worthless. I then apply to the original vendor, remind him of what he told me, and complain to him that my money lent upon mortgage has been lost, and I commence an

1873
PEEK
v.
GURNEY.

action against him for damages to recover my loss. I ask, could such an action be maintained? I know of no authority for it, and I am of opinion that an action of that kind would not lie.

My Lords, I take the rule on this point to have been happily stated in some expressions of my noble and learned friend the late Lord Chancellor (Lord *Hatherley*), when he was Vice-Chancellor, in the case of *Barry* v. *Croskey* (1), in passages which I will take the liberty of reading to your Lordships. The first occurs during the argument. Upon a reference to the case of *Langridge* v. *Levy* (2), the Vice-Chancellor said: "I take the ground of that decision to have been, that the false representation was made by the Defendant with a view that it should be acted upon by the son in the manner that occasioned the injury. Mr. Baron *Parke* says: 'There is a false representation made by the Defendant, with a view that the Plaintiff should use the instrument in a dangerous way.' The father, acting upon the faith of that representation, put the gun into the hands of his son, who fired it off, when it burst and injured him. Suppose a stranger knowing nothing of what had passed between the father and the Defendant, to have found the gun, lying for instance at an inn. If a stranger so finding the gun had taken it up and fired it, and the gun had burst and injured him, would he have had his action against the Defendant upon the ground that *Nock's* name appeared upon the gun, and the Defendant had sold it with that name appearing upon it, and as a gun made by *Nock*." Again, in the course of the argument, the Vice-Chancellor, addressing Mr. *Rolt*, says: "Your argument would shew that every person who in consequence of *De Berenger's* frauds upon the *Stock Exchange* was induced to purchase stock at an advanced price, in reliance upon the false rumour he had circulated that peace was concluded, was entitled to maintain an action against *De Berenger* for the increase of price. Would not such consequences be too remote to form ground for an action?" Finally, in giving judgment, the Vice-Chancellor stated what he understood to be the principles applicable to such a case. First, that "every man must be held responsible for the consequences of a false representation made by him to another, upon which that other acts, and, so acting, is injured or damnified;

(1) 2 J. & H. 117-18-23. (2) 4 M. & W. 337.

Secondly, every man must be held responsible for the consequences of a false representation made by him to another, upon which a third person acts, and so acting, is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss." And thirdly, he continues: "But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequence of the representation thus made. To render a man responsible for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, it must appear that such false representation was made with the direct intent that it should be acted upon by such third person in the manner that occasions the injury or loss." And His Honour comments a second time on the case of *Levy* v. *Langridge* (1) as consistent with that principle.

My Lords, upon the grounds which I have mentioned, and upon the principles laid down in the case of *Barry* v. *Croskey* (2), which appear to me to be consistent with what is stated by all the authorities that might be referred to, I am of opinion that the Appellant in this case has entirely failed to connect himself with the representations made in the prospectus, of which in my opinion an original allottee might have complained, but of which the present Appellant cannot, I think, complain. On these grounds, therefore, I agree to the motion of my noble and learned friend that this appeal ought to be dismissed.

LORD CHELMSFORD:—My Lords, I wish to ask your Lordships whether you think that there is anything in this case that ought to take it out of the ordinary rule with regard to costs.

LORD CAIRNS:—Your Lordships have been in the habit, I think, of adhering very firmly to the rule that in this House the costs on the dismissal of an appeal should follow the result. I own that I see nothing in this case to make it an exception to that general rule. Your Lordships arrive at the conclusion which was arrived at by the Court below, although not on the same grounds; but if,

(1) 4 M. & W. 337. (2) 2 J. & H. 117-18-23.

1873
PEEK
v.
GURNEY.

by reason of the circumstance that the grounds are not the same, the costs were not to follow the result, this consequence would happen, that in every case in which the decision below is confirmed, if the grounds upon which the confirmation proceeds are not the same as the *ratio decidendi* of the Court below, the unsuccessful party must be absolved from paying the costs of his unsuccessful appeal.

Order appealed from affirmed; and appeal dismissed with costs.

Lords' Journals, 31st July, 1873.

Solicitor for the Appellant: *W. A. Downing.*

Solicitors for the various Respondents: *Young, Jones, Roberts, & Hale; Bevan & Whitting; Wilson, Bristows, & Carpmael; Young, Maples, Teesdale, Nelson, & Co.; Uptons, Johnson, Upton, & Budd.*

1873
July 10, 11, 14, 31.

CÆSAR LAMARE . . . . . APPELLANT;

AND

THOMAS DIXON . . . . . RESPONDENT.

Agreement—Specific Performance—Acquiescence—Form of Decree—Costs.

20 L.J. Ch. 610

A decree for specific performance of a contract cannot be accompanied by directing an inquiry whether a matter which was a consideration for entering into the contract has been, or can be, properly performed.

Where a suit is instituted for specific performance of a contract, and the defence set up is, that the contract was made in consideration of certain promises which the Plaintiff had not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the nonfulfilment of the alleged promises.

Where the subject of the contract was an agreement to take the lease of a house, and the proposed tenant went into possession at once, and occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, and paid rent, but always paid it under protest:—

Held, that these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but

1873

LAMARE v. DIXON.

that the payments were to be treated as merely made in respect of the actual use and occupation, and in no other character.

Per LORD CHELMSFORD:—The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court.

Per LORD CAIRNS:—The law implies that a person who takes possession of premises before the agreed works to render them fit for occupation are at an end, does so without prejudice to his rights under the agreement.

A. was the owner of some land, on which he was about to erect buildings, *B.* wished to have cellars there for wine vaults. *A.* promised that they should be made dry, but would not introduce that promise into the written agreement. *B.*, however, confiding in the promise, signed the agreement, by which he undertook to accept from *A.* a lease of the vaults for a certain term and at a certain rent. *B.* was to pay down £100, and was to pay another £100 on the execution of the lease. *B.* paid the first £100, and, for his own convenience, before the day fixed, took possession of the vaults, and placed therein a large quantity of wine, but soon complained that the vaults had not been made dry. These complaints he constantly renewed, and every time he paid the rent paid it under protest; and, finally, after more than two years' actual occupation of the cellars, refused to sign the lease on the ground that the cellars had not been made fit for his occupation, and he did not pay the second sum of £100, but removed his stock of wines to another place. On a bill for specific performance, the Court below granted a decree against *B.*, but accompanied it with a direction that there should be an inquiry whether a certain thing suggested by *B.* in the course of the long correspondence between the parties, but neglected by *A.*, should not be done:—

Held, that the decree in this form was erroneous:

Held, also, that the taking possession of the vaults and the payment of the rent, which payment must be attributed to the actual use and occupation of the premises, did not prevent *B.* from setting up as a defence the non-performance of the promise which had been the inducement to the contract.

Held, also, that as there had been delay on both sides, though the Plaintiff's bill ought to be dismissed, it must be dismissed without costs.

APPEAL against a decree of Lord Chancellor *Hatherley*, which, reversing a previous decree of the Master of the Rolls, had granted a decree for specific performance, accompanied by a direction for an inquiry. *Dixon* was the holder of some land in *Eaton Lane, Pimlico*, and was about to build upon it; *Lamare* was a wine merchant, dealing especially in French wines, for which, as he alleged, he required very dry cellars. He entered into negotiations with *Dixon* for the hire of the cellars under the buildings which *Dixon* proposed to erect. *Dixon*, as it was alleged, promised that the walls and floors of the cellars should be concreted, and said that would make them dry. The terms of the conversations

1873
LAMARE
v.
DIXON.

on this matter were differently represented in the affidavits in the cause, and formed the subject of comments in the judgments delivered in the House. There was not introduced into the written agreement any specific promise as to making the cellars dry, but *Lamare* became satisfied through his conversations with *Dixon* that they would be made dry, and, on the 10th of July, 1867, he signed an agreement for a lease. By the terms of this agreement he was at once to pay down a sum of £100, and on the execution of the lease he was to pay another sum of £100; the tenancy, beginning on Christmas Day, 1867, was to be for twenty-one years, at a yearly rent of £130. The cellars were to be of the height of 8 ft. 6 in., and *Dixon* engaged before the 24th of December to cause the floor and exterior side of the walls of the cellars to be well concreted, and that there should be a water-closet, cistern, and sink constructed in the cellars, with water laid on, and that the premises should be completely finished for occupation by the 25th of December then next.

Lamare having at the time a large quantity of wine on hand, proposed to enter on the premises at an earlier period, and he did so on the 5th of December, and deposited his wines in the cellars. That this was to be without prejudice to *Lamare's* right under the agreement was asserted on one side and denied on the other. As the buildings above were to be on the level with the road, and the cellars were to be of the height of 8 ft. 6 in., it became necessary to sink the flooring of the cellars lower than had been at first intended, and the result was to bring the cellar flooring below the level of the main sewer of the place. The cellars, therefore, could not be drained in the usual way, and they were stated to be very damp. *Lamare* complained of this; but nothing was done to his satisfaction to cure the evil. The day for signing the lease arrived; the draft lease was sent to him, but he would not execute it. A long correspondence ensued, and, among other things, the erection of catch-pits was suggested by *Lamare's* surveyor, but the suggestion was never acted on by *Dixon*. During all this time *Lamare* continued in occupation of the cellars, and always regularly paid the rent stipulated for in the agreement, but always paid it under protest. On the 14th of October, 1869, a pipe burst on the premises, and *Lamare* called on *Dixon* to remedy the mischief.

1873
LAMARE
v.
DIXON.

This was not done, and *Lamare* wrote to say that if *Dixon* did not do what was necessary to make the cellars dry, he would himself do it and charge *Dixon* with the amount. *Dixon* refused to do anything, and, finally, *Lamare* gave notice of his intention to quit the premises, and he did quit them. *Dixon*, on the 23rd of December, 1869, filed his bill for specific performance of the agreement. *Lamare*, by his answer, admitted having taken possession of the premises, and paid rent, but only under protest, and he alleged that it was of the essence of the agreement that the cellars should be dry, but that they were not so, and had not been made dry, but were unfit for the purpose for which he had agreed to take them, and he had therefore been compelled to leave them. Evidence was taken on both sides, and, on the hearing, the Master of the Rolls dismissed the bill. On appeal, Lord Chancellor *Hatherley*, looking at the conduct of *Lamare*, in taking, and so long retaining possession, as having precluded him from finally refusing to execute the lease, thought he could not resist the claim for specific performance, but must be left to his remedy against *Dixon* for any damages he might have suffered. His Lordship therefore reversed the decision of the Master of the Rolls, and decreed specific performance of the agreement; and he accompanied this decree with a direction that there should be an inquiry whether the catch-pools and pumps, as suggested by *Lamare's* surveyor, were necessary or proper for the fit occupation of the premises for *Lamare's* business, and if so, what compensation or allowances ought to be made to *Lamare* in respect thereof.

This was an appeal against that decree.

Mr. *Southgate*, Q.C., and Mr. *Kekewich*, for the Appellant:—

The Lord Chancellor, although in favour of *Lamare* up to a certain point, namely, to the effect that everything proper had not been done, and that there might have been something else done, which ought to have been done, and still desiring to know whether something else might not be done, yet decreed specific performance. This was erroneous. The two parts of the decree were inconsistent with each other. In form therefore the decree was wrong. It was also wrong in substance. The circumstances

1873
LAMARE
v.
DIXON.

in this case were such that the Court ought not to have granted specific performance: *Day* v. *Newman* (1); *Townsend* v. *Standgroom* (2); and where representations are made and really constitute the bases of a contract, but are not carried into effect, they may become the ground for refusing specific performance of the contract though the execution of them might not be enforceable against the person who made them: *Myers* v. *Watson* (3), where the representations were made, not by the vendor himself but by his agent, and yet, those representations being unfulfilled, specific performance was refused.

Mr. *Kay*, Q.C., and Mr. *W. Pearson*, Q.C., for the Respondent:—

Myers v. *Watson* does not establish what is supposed, or does not apply here. There the vendor undertook to do certain specific things, which things were never done. When, therefore, it was sought to obtain against the vendee specific performance of his part of the agreement, he could well answer the demand by saying that the other part of the same agreement had been left unperformed. Here there was no undertaking that *Dixon* would do any specific thing which he had left undone, or that he had left undone anything that he really contracted to do. He denied that he had ever given an absolute promise that the cellars should be dry; he had said that he would put down concrete, and then that they would be dry. That was a matter of opinion as to a future fact, and could not be a ground for refusing specific performance. He put down the concrete, and he had done all in his power to make the cellars dry, and thoroughly performed what he contracted to do. If the cellars were not dry it was no fault of his. There was no agreement whatever that they should be made dry at all cost; but, in fact, they were sufficiently dry for all purposes of use. *Lamare* had shewn this by remaining in them so long a time. His own conduct therefore was an answer to his own complaint, both in equity and in fact. There was no concealment here, and consequently no ground on which *Lamare* could base his refusal to perform. Whatever objection he might have had he had waived:

(1) 2 Cox. 77; and see *Callaghan* v. *Callaghan*, 8 Cl. & F. 374.
(2) 6 Ves. 328.
(3) 1 Sim. (N.S.) 523; see Sug. V. & P., 13th Ed. p. 20, see also pp. 131, 231.

Burnell v. *Brown* (1). The contract here was in writing, and was conclusive; the alleged parol understanding could not control nor even affect it: *Haywood* v. *Cope* (2). *Lamare*, who had had cellars in the neighbourhood, knew as well as *Dixon* what the place was, and he could not, after taking possession and so long remaining in possession, set up a claim to be released from his contract on the ground that his expectations had been disappointed.

Mr. *Southgate* replied.

LORD CHELMSFORD:—

My Lords, this is an appeal from a decree of Lord Chancellor *Hatherley*, which reversed a previous decree of the Master of the Rolls dismissing the bill filed by the Respondent for the purpose of compelling specific performance of the agreement between the parties.

The Respondent is the lessee of a piece of land in *Eaton Lane*, *Pimlico*, upon which he was about to build. The Appellant, a wine merchant, was in want of vaults for his business, and negotiations took place for an agreement between the parties, that the Respondent should build cellars, and the Appellant take them upon lease. In the discussions as to the terms of the lease the necessity of dryness of the cellars was mentioned, and the Respondent assured the Appellant that the concrete on the outer walls and on the floor provided for by the agreement would keep the cellars perfectly dry. The agreement was entered into upon the 10th of July, 1867. The Respondent, in consideration of £100 paid down, and of another £100 which was to be paid upon the execution of the lease, agreed to "construct, erect, and completely finish on and under the site of the messuages and premises" in *King's Row* and *Eaton Lane*, *Pimlico*, "a messuage, coach-houses, and stable, with rooms and loft above the said coach-houses and stable, and the said vaults thereunder, according to the elevations and measurements shewn upon a plan signed by both parties," and to grant a lease to the Appellant, which was to commence upon Christmas Day following, at the rent of £130 a year. It was agreed by the Respondent that the premises should be fit

(1) 1 Jac. & W. 168. (2) 25 Beav. 140.

1873
LAMARE
v.
DIXON.

for occupation on Christmas Day, 1867, the day upon which the lease was to begin. The agreement contained a clause that *Dixon* should be "at liberty from time to time to enter the premises to be demised at all reasonable times, to open, repair, and cleanse all or any of the drains or sewers under the said premises." And it was agreed by *Dixon* that he would construct the vaults to be "of the height of 8 ft. 6 in. at least;" and that he would "cause the floor and exterior side of the walls of the vaults to be well concreted."

The Appellant entered upon the premises before the day fixed, and while the works to be done were still in an incomplete state. The agreement appears to contemplate that there would be drains to the premises. But as there was to be a coach-house over the wine vaults, and the vaults by the agreement were to be 8 ft. 6 in. in height, it was found necessary, in order to give the requisite height to the vaults, and also to provide for convenient access to the coach-house, to lower the vaults, and thus to bring the bottom of them to a depth of two or three feet below the level of the main sewer; a system of self-acting drainage, therefore, became impossible. A short time after the occupation commenced the premises were far from being in the dry state the necessity of which had been pressed upon the Respondent's attention. He had agreed that they should be fit for the Appellant's occupation as a wine merchant, and both the Master of the Rolls and the Lord Chancellor held that they never were in a proper state for a wine merchant's business.

It is unnecessary to go minutely into evidence upon this subject, but I will just point your Lordships' attention to the evidence given by two servants of the Appellant, and also by two wine merchants. *John Saunders*, who had been in the employment of the Appellant for upwards of nine years, says: "During the whole of the time of the occupation of the Defendant, after the first two months, there was always water running down the walls of the cellars, and coming up through the floor, to such an extent that I have myself more than once laid down boards to walk on when working in the cellars, and I have also seen other persons lay down boards for the same purpose when working in the said cellars."

And *Edouard Prieur*, also in the service of the Appellant, says:

"At the time the said Defendant stowed the said hogsheads of wine upon the said premises there was no appearance of dampness in the said cellars, but after the Defendant had been in occupation for some time the water commenced to come into the said cellars in considerable quantities; it used to drip from the ceilings and to pour down the walls, and run in little streams under the wine-bins; and I have sometimes seen the water standing on the floor of the said cellar to a depth of about two inches at different parts, on which occasion I have had boards put along for persons to walk over." Then we have the evidence of two wine merchants. The first is *George Ridley*, who says: "I know the cellars in *Eaton Lane* lately occupied by the Defendant, and I well remember visiting them in the early part of the present year, when the condition of the said cellars was such as to render them utterly unfit for use as wine cellars. The walls were very wet, and the water seemed to me to be oozing through them and to be rising up through the floors, whereon in some places it stood in little pools. The sawdust throughout the vaults was saturated with water, and I noticed little streams of water trickling under the bins of wine towards the centre of the said vaults. I did not see any means of getting rid of the water I saw in the said vaults. I am enabled to say with confidence, from my very long experience in the trade, that the said vaults are utterly unfit for use as vaults for the storage of French wine." And *Pannot* says: "I have no hesitation in saying that the said cellars are quite unfit for the storage of wine, and that great damage may have been occasioned to the wine of the Defendant by the wet during the time it was stored in the said cellars."

Upon this ground, my Lords, *Lamare* would undoubtedly have succeeded in resisting the specific performance of the agreement before the Lord Chancellor, as he had done before the Master of the Rolls; but the Lord Chancellor held that he, by remaining upon the premises, and insisting upon the performance of the agreement, had deprived himself of the defence to the suit which he would otherwise have had. I apprehend that upon an objection that delay has taken away a person's right to resist a suit for specific performance, it must be a delay under such circumstances as to amount to a presumption of acquiescence. Upon that matter

1873
LAMARE
v.
DIXON.

the facts were these: After taking possession, *Lamare* was continually complaining that *Dixon* had not performed his agreement. *Lamare* paid his rent at first with reserves, as it was called, and afterwards under protest; and on the 9th of July, 1868, he stated that he should continue to pay in the same manner, until *Dixon* had performed his agreement. *Dixon* sent back the letter with these words written upon it: "I have done all I agreed to do, and shall do no more." Matters remained in this state until the 30th of September, 1868, when *Lamare* wrote to *Dixon* this letter: "Being just returned from my usual two months' journey in *France*, and finding that my premises are still incomplete, and wanting in many matters mentioned to you and to your solicitor by myself and by my solicitor, and in other matters not specifically mentioned, but which present themselves at once upon inspection of the premises, and particularly that the cellar must be drained before the winter, to make it at all fit for my business, I beg hereby to give you notice that if you do not cause all the above matters to be done upon the premises, or at least commenced before this day fortnight, I shall myself do what is necessary, and charge you with the amount of my outlay." The Lord Chancellor says that this was an adhering to and insisting upon the agreement, and undoubtedly, in a sense, that is correct. But we must have some regard to the situation in which *Lamare* was placed. He had upwards of 30,000 bottles of wine in the vaults. The inconvenience and expense of this stock being removed would have been very great, and he was most anxious to remain, and willing to do so, if *Dixon* would but put the premises in a proper state. The letter of the 30th of September was intended to compel *Dixon* to perform his agreement, by *Lamare* threatening to do something, which he could have no right to do under the agreement itself.

From September, 1868, to October, 1869, there was a pause on both sides. As Mr. *Kekewich* very tersely observed, quiescence is not acquiescence. But *Lamare* cannot be said to have been entirely passive, as he continued to pay his rent, though under protest. This was intended to warn *Dixon* that he must not consider the payment of the rent as a submission to the agreement. *Lamare* was bound to pay, and could have been compelled to pay, for the use and occupation of the premises, and in an action of this

description the rent would probably have been taken as the measure of his liability. *Dixon*, by his conduct, might well have led *Lamare* to believe that the question as to the agreement was still open. He accepted the rent paid under protest, without any objection. He never pressed for payment of the £100 originally payable; he did not insist upon the draft lease being accepted, so that, on delivery of the lease, the other £100 might become due.

Now, my Lords, the exercise of the jurisdiction of equity as to enforcing the specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court —not an arbitrary or capricious discretion, but one to be governed as far as possible by fixed rules and principles. The conduct of the party applying for relief is always an important element for consideration. Now *Dixon* from first to last had not performed the agreement by making the vaults fit for the occupation of a wine merchant. Of this opinion, as I have already remarked, were both the Master of the Rolls and the Lord Chancellor. He has, therefore, no merit in himself to entitle him to the consideration of the Court. His claim rests entirely upon the assumed acquiescence of *Lamare*. *Lamare* took possession before all the works were done, but he did so upon the faith that they would be afterwards completed according to the agreement. His position would have been different if he had waited to take possession until the day mentioned in the agreement, and had then taken possession of them upon the assumption that everything had been completed which *Dixon* was bound to do. If *Lamare*, without ascertaining for himself whether this was so or not, had entered upon the premises, and had placed his wine in the vaults, and had kept possession of them after finding out that the agreement had not been performed, his case would have been very different. But relying upon the agreement being performed on *Dixon's* part, he placed himself in a situation in which he was almost under duresse as to remaining in the premises. He held on, hoping from time to time that something would be substituted for self-acting drainage. *Dixon* admitted his obligation to do something, by putting up a catch-pool and pump, which, however, were quite insufficient to keep the vaults dry. If he had put up sufficient catch-pools, *Lamare* would have been very glad to remain in the premises.

1873
LAMARE
v.
DIXON.

And the Lord Chancellor, in his decree for specific performance, directs an inquiry whether the catch-pools suggested on behalf of *Lamare* were necessary for the fit occupation of the cellars.

Looking to the fact that the agreement has never been performed on the part of *Dixon*, and that he permitted *Lamare* to take possession under the belief that he would complete what was necessary to be done, which he has not done; and having regard to the difficulties in which he has placed *Lamare*, which made him anxious not to quit the premises if *Dixon* would render them fit for his occupation; though *Lamare* may have delayed too long insisting upon his extreme right to abandon the agreement, yet *Dixon*, never having from first to last performed his part, he comes before a Court of Equity with no merit of his own to entitle him to relief, and assuming that there are faults on both sides, *Lamare*, who is upon the defensive, is in the more favourable position of the two. I do not think, upon the exercise of a fair and just discretion, that this is a case in which specific performance ought to have been decreed.

I submit, therefore, that the decree of the Lord Chancellor ought to be reversed. But I suggest to your Lordships that the Master of the Rolls, in dismissing the Respondent's bill ought not to have dismissed it with costs. I would therefore suggest that, reversing the decree of the Lord Chancellor, the case should be remitted with a declaration that the Respondent's bill ought to be dismissed without costs. There should be no costs of the appeal before the Lord Chancellor, and no costs of the present appeal.

LORD COLONSAY was of the same opinion; and had no doubt, upon the evidence, that these premises were not fit for the business of the Appellant.

Under these circumstances, the Respondent was not in a position to insist upon the specific performance of the agreement.

LORD CAIRNS:—

My Lords, the decree in this case which is under appeal has been framed, I have no doubt, with the most scrupulous desire to do exact justice between the parties; but it has adopted a form which appears to me to be unusual in cases of specific perform-

ance, and to be attended with considerable danger. The decree, as your Lordships will observe, declares that the agreement ought to be specifically performed; it orders the specific performance of the agreement, and orders the Defendant (*Lamare*) to pay the costs of the suit. The Lord Chancellor at the same time expressed an opinion that it was an essential part of the agreement that the premises, the subject of the agreement, should be fit for occupation by *Lamare*, and directed this inquiry: "Ordered, that an inquiry be made whether the other catchpools and pump suggested by the surveyor of the Defendant were necessary or proper for the fit occupation of the said vaults and premises for use, and if so what compensation or allowance ought to be made." Now, my Lords, it is abundantly clear upon the case, as indeed the decree assumes, that these catchpools and pump were suggested by the surveyor of *Lamare* at a very early period. When they were suggested they were refused on the part of *Dixon*, and the refusal was repeated more than once at subsequent periods; and after that suggestion and after that refusal, *Lamare* claimed the right (I do not at present speak of the question of delay) to relinquish the premises and not to be bound by the agreement, and he left the premises.

Now, my Lords, if it should turn out that the inquiry, the order for which I have read, should result in the finding that the catchpools and pump were necessary for the fit occupation by *Lamare* of the vaults and premises, the result would be this: there would be a claim made by the Defendant in the suit to have that done which was necessary for the fit and proper occupation of the premises; there would be a refusal on the part of the Plaintiff in the suit, before the suit was instituted, to do that which was thus found to be necessary and proper; there would then be a relinquishment of the premises by the Defendant in the suit, and still there would be, after that, a decree for specific performance and costs against him. My Lords, I own that it appears to me that a decree framed in that way would shew inconsistency even upon the face of it.

But now let me direct your Lordships' attention to the facts of the case so far as they appear to me to be material. At the time the agreement was entered into between *Lamare* and *Dixon*, the

1873
LAMARE
v.
DIXON.

cellars in question were not constructed, but we find upon the evidence of *Dixon* that he possessed this knowledge with regard to the place where he was about to construct the cellars. He says: "I called at the Local Board of Works in January, 1867" (the agreement was in July of that year), "to know the depth of the main sewer in reference to building my house, and Mr. *Richmond*, the surveyor, told me the depth from the crown of the road. This was before I intended to construct the cellars. I know the depth of the sewer, but I never informed the Defendant of it. I was not asked." *Dixon*, therefore, at the time he entered into the agreement had himself become aware of what the depth of the main sewer was. He knew the depth at which he proposed to construct the cellars, and he must have known, therefore, that the level of the cellars would be below the level of the sewer; and he must, consequently, have known that no self-acting plan of drainage could be put into operation in those cellars.

In that state of things *Lamare* in his evidence says that this was the statement made to him, and upon this part of his evidence I ought to observe that *Lamare* has not been cross-examined. He says: "During the negotiation, and before the signing of the agreement," "I on different occasions pressed upon the Plaintiff the necessity of making the cellars quite dry and well ventilated, and it was with the view of making the said cellars quite dry that the agreement contains the provision that the floor and exterior walls of the said vaults should be well concreted; and in reply to my remarks upon this subject I have more than once been assured by the Plaintiff that the cellars would be quite dry and that no water could come in." Mr. *Bartlett*, the solicitor, gives evidence on the same side to the same effect, and I may observe that he is not cross-examined at all upon any part of his evidence. He says: "From what passed between the Plaintiff and the Defendant in my presence I am enabled to say positively that the Plaintiff well knew at the time of signing the said agreement that the said vaults were required by the Defendant for the purpose of storing his wine, and that it was of the greatest importance to the Defendant to have possession of the said vaults at the earliest moment, in order that he might take his stock there." "I also

recollect that the necessity of dryness of the cellars was discussed between the Plaintiff and the Defendant in my presence at the interview before mentioned; and the Plaintiff assured the Defendant that the concrete in the outer walls and on the floors, as provided for in the said agreement, would keep the said cellars quite dry, and this discussion is what I referred to in my letter to the Plaintiff's solicitor, dated 20th October, 1869."

Now I must call your Lordships' attention to the denial of this on the part of *Dixon*. Your Lordships have the evidence of two witnesses, who are not cross-examined upon this subject, on the side of *Lamare*; but *Dixon* says: "the Defendant never informed me that the vaults must be dry, and I never assured him that they should be so, and he never stipulated that they should be drained. He was always fully aware that the vaults were not drained" (that, of course, must have been the case at a subsequent period). "I never assured him that they should be dry." Then, afterwards, he says: "I absolutely deny that I ever said to the Defendant, as stated by him in his affidavit, that the cellars should be quite dry, and that no water could come in, or anything to that effect. I knew that cellars generally could not, from their underground construction, be quite dry." In his cross-examination he says this: "The Defendant said nothing to me as to the reason why the walls should be concreted. He never mentioned it to me at all. It was my suggestion to my builder. I suggested it to keep the walls dry. My show-room for bright goods was over the cellars. I was anxious that the cellars should be as dry as possible, and I was anxious to keep the cellars dry for my own sake, but I did not think it was necessary for a wine merchant. I did not tell the Defendant and Mr. *Bartlett* at the solicitor's office, before signing the agreement, that the concrete on the outside of the walls and floors would keep the cellars dry. I did not conceive it possible to keep the cellars quite dry. I do not recollect saying anything at that interview about keeping the cellars dry."

My Lords, I own that upon this balance of testimony, without resorting to the rule which used to obtain in the Court of Chancery, that great, and perhaps unusual, weight should be given in a suit for specific performance to the oath of the Defendant; without

1873

LAMARE v. DIXON.

resorting to that rule, but taking the evidence as it stands, it appears to me that this contradiction by *Dixon* dwindling down, on his cross-examination, to his not recollecting saying anything at the interview with Mr. *Bartlett* about keeping the cellars dry, cannot be taken to countervail the positive statements of *Lamare* and of *Bartlett*. And I am the more disposed to come to that conclusion when I add, as I must, that I cannot accept this statement of *Dixon's*, that the idea of having concrete on the walls was his own; that it was never mentioned by the Appellant at all, but put into the agreement for his own sake, in order that, there being concrete below, he might have his own dry stores in a proper condition above. I cannot imagine that when he was building his own cellars he would for his own sake have put into the agreement with *Lamare* that there should be concrete on the walls. He could have done that perfectly well, if it was only to be done for his own sake, without stipulating for it in the agreement. I, therefore, arrive at the conclusion that the representation was made as stated by *Lamare* and by his solicitor, Mr. *Bartlett*.

My Lords, I quite agree that this representation was not a guarantie. It was not introduced into the agreement on the face of it, and the result of that is, that in all probability *Lamare* could not sue in a Court of Law for a breach of any such guarantie or undertaking; and very probably he could not maintain a suit in a Court of Equity to cancel the agreement on the ground of misrepresentation. At the same time, if the representation was made, and if that representation has not been and cannot be fulfilled, it appears to me upon all the authorities, that that is a perfectly good defence in a suit for specific performance, if it is proved in point of fact that the representation so made has not been fulfilled.

That brings me to the next question, namely, were the cellars, in point of fact, wet? That question may be dealt with very shortly, because I observe that the Master of the Rolls pronounced an unhesitating opinion upon the subject, and the Lord Chancellor stated what appears to me to sum up entirely this part of the case: "I also hold, so far with the Defendant, that a place which is constantly damp and submerged in water, from five to six inches of water in some cases lying on the floor, would not be a place for a wine merchant's cellar. I do not think we need go much into the

evidence upon that, and I shall not comment upon it. Certain people have been brought forward to shew that to a certain peculiar class of wines it did not signify. Other witnesses have been called to prove that for some wines it did signify a great deal; but I apprehend this Court would never say that a place which was liable to be submerged in water, to the extent of six inches, would be a fit place for occupation as a wine cellar."

My Lords, I have marked the evidence upon this subject of *Ridley*, of *Pannot*, of *Finke*, and of *Fenwick*, all wine merchants. They speak to the condition in which they found the cellars, and their evidence is not contradicted, and they are not cross-examined upon it. But I will only now ask your Lordships to observe the evidence on cross-examination of a person named *Chapman*, one of the witnesses for *Dixon* himself. *Chapman* says, that he went over the cellars with Mr. *Bartlett* and another gentleman: "I walked with them holding a candle. Water was not at that time standing on the floor of the cellar, except at the eastern end. I lit the gas, and I shewed Mr. *Bartlett* the water trickling down the walls; I remember telling Mr. *Bartlett* that the inner cellar was always wet, but not that the water was trickling under the bins in the front cellar. I don't remember Mr. *Bartlett* saying in a joke, 'Are you sure it is not wine?' He might have said so, but I do not remember it. I don't remember anything being then said as to the water trickling under the bins in the front cellar. The water was sometimes trickling under the bins in the inner cellar." . . . "The catch-pit has never been emptied twice a day that I know of; I cannot say what is the size of the waste pipe. On two occasions we had to put boards down in both the cellars to walk upon." That is the evidence given by a witness for *Dixon* himself.

In addition to this, I will only observe upon what was suggested in argument, namely, that some of this wet was to be attributed to the fact that *Lamare* had broken the concrete by letting down some of his partitions for bins into the floor. I do not think that that explains the evidence which I have read. It clearly would not explain the water trickling down the walls; and, moreover, there is no witness who says that breaking the concrete for the purpose of letting down that which might operate as a plug into

1873
LAMARE
v.
DIXON.

it, would itself allow the water to come into the cellar. But, my Lords, I go farther than that, and say that it must have been perfectly well known to the Respondent that if these premises were to be used as cellars, and bins fixed in them, it would be absolutely impossible to fix the bins in any way without, to a greater or less degree, puncturing the floor, and of course puncturing the concrete on the floor.

That being so, the representation being such as I have mentioned, and the facts as to the cellars being such as is proved by the evidence, it appears to me that there would be entirely an end of the case as to specific performance, unless the right to object has been given up by *Lamare*. That it was given up by taking possession is out of the case. Possession was taken before the time appointed for the completion of the works, at a time when the works were clearly incomplete. And without entering upon the question whether the words that are stated by *Lamare* were actually used, namely, that he took possession without prejudice to his rights under the agreement, the law would imply that incident to his taking possession from the mere fact that he took possession before the works were at an end. Clearly, my Lords, nothing was settled; nothing was accepted before the month of April, 1868. *Lamare* says that the want of drainage was objected to by his surveyor in January of that year. *Dixon* denies this, but he admits that in the month of April, when the rent was first asked for, an objection was made. Indeed, your Lordships will find this fact put beyond doubt by two sentences in letters to which I will refer you. In a letter of the 9th of April, *Lamare's* solicitors say, speaking of other objections which they made to different parts of the work, "The surveyor insists that the drainage must be amended, as, under existing arrangements, the cellars are liable at any time to be overflowed; we need not tell you that such an accident would cause considerable damage, and that the objection is not a vexatious one." And again, in the same month, on the 18th of April, the solicitors say, "The drainage is not complete, nor do we believe that Mr. *Lamare* knew anything as to its defects until he came down one morning and found his cellar covered with water. It is idle, as it appears to us, to say that 'Mr. *Dixon* never undertook to do any other drainage.'" And then, on or soon after

the 18th of April, 1868, came the inspection by Mr. *Hayton*, and the suggestion which he made with regard to the catch-pits. That is stated in this way by *Dixon* himself: "Mr. *Hayton* did suggest when he saw my workmen" (this is in April, 1868) "making the catch-pit, that I should put in a pump and make other catch-pits; but I declined to do so, as I did not think that catch-pits were necessary, or that I was bound to put them in, and I said that Mr. *Lamare* might find the pump himself."

My Lords, after this, when there was this suggestion made by *Hayton*, and this refusal which I have read, the rent was always paid under protest; the return of the draft lease was not asked for, nor the payment of the £100. I take the meaning of paying the rent under protest to be, that the person paying indicated that he paid the rent for the use and occupation of the premises, but not as under the agreement, nor as recognising the validity or the binding character of the agreement.

Then, my Lords, we find that the next fact is this.—On the 9th of July, 1868, on the payment of the rent, a letter was written, with these words: "Mr. *C. Lamare* pays the rent under protest until Mr. *Dixon* has fulfilled his agreement, and delivered place in tenantable condition," to which *Dixon* answers: "I have done all I agreed to do; shall do no more." Again, on the 30th of September *Lamare* writes: "Being returned from my usual journey in *France*, and finding that my premises are still incomplete and wanting in the many matters mentioned to you and to your solicitors by myself and by my solicitor, and in other matters not specially mentioned; and particularly that the cellars must be drained before the winter to make it at all fit for my business, I beg hereby to give you notice that if you do not cause all the above matters to be done upon the premises, or at least commenced, before this day fortnight, I shall myself do what is necessary, and charge you with the amount of my outlay. I send you the last quarter's rent, but you will, of course, understand that I in no way abandon my claim against you for damages on account of the non-performance of your agreement in many respects." To which *Dixon* answers: "I have already done more than I agreed to do, and shall do no more, as I before informed you."

It is quite true that *Lamare* said in this letter that he would do

1873
LAMARE
v.
DIXON.

the work and sue for damages. I do not at all hold him to be concluded by that. I apprehend that he was perfectly free a week after that letter, as he was free a week before, to maintain and hold his position on the non-performance of the agreement, to say, that although he had used the threat of doing the work, and suing for damages, he was not bound to pursue that course, but was at liberty to repudiate the agreement *in toto*.

We then come to the only part of the case which appears to me to present any difficulty. From that time, the 30th of September, 1868, till about a year afterwards, there occurred nothing whatever except the payment of the rent, when it became due, under protest. During the whole of that time *Lamare* took no farther steps. Nor did *Dixon*. He never required the draft lease to be returned to him for the purpose of execution. He did not demand and require the payment of the £100 which, on its execution, would have become payable under the agreement. There is no doubt that there was delay on both sides, but the question is, against whom does the delay operate most severely. In my opinion, clearly against *Dixon*. *Lamare* had a perfect right to say, As long as I am allowed to do it, I will continue here, not holding under the agreement, but holding either as tenant at will, or tenant from year to year. I will pay my rent for use and occupation from time to time as it is demanded, but I will keep up my protest to shew that I occupy, only in fact, but without admitting the validity of the agreement. But *Dixon* had the matter entirely in his own hands. If he was dissatisfied with that state of things, if he was dissatisfied with having a tenant in that equivocal position, if he wished to have it decided, once and for all, that *Lamare* was there under the agreement, and not holding merely upon terms of use and occupation, he had nothing to do but to insist upon the return of the draft lease and the payment of the money, and, in default of that demand being complied with, to have instituted at that time, if he was in a condition to maintain it, his suit for specific performance. He thought fit not to do so; and I am of opinion that the delay which occurred at that time operates most severely against him.

What took place after that time? At the end of the year 1869 there came, from the bursting of a pipe, an extraordinary addition

to the wet in the cellars, and thereupon the tenant obtained other premises, and after some weeks removed his wine from the cellars in question.

My Lords, although agreeing that there has been a delay, yet I hold that, at the commencement of that delay, *Lamare* clearly had a right to repudiate the agreement and throw up the premises: and I am of opinion that he did not lose that right by remaining in the premises and paying his rent with the protests to which I have referred. The delay from that time onwards was more peculiarly the delay of *Dixon*, and he, as it appears to me, cannot obtain a right to specific performance grounded upon the delay of *Lamare*, when he clearly would not have had that right at the commencement of the period which is called the period of delay.

My Lords, the only alteration that I should have thought ought to be made in the decree of the Master of the Rolls was this: inasmuch as the delay which occurred was chargeable, though in different proportions, to both parties, I should have thought that the more usual course would be to dismiss the bill for specific performance without costs; and I think your Lordships would act rightly in making that alteration in the decree of the Master of the Rolls.

Decree appealed from reversed with declaration.

Lords' Journals, 31st July, 1873.

Solicitors for the Appellant: *Nicholson & Herbert.*
Solicitor for the Respondent: *Joseph Needham.*

1873

BROWNE AND OTHERS . . . . . APPELLANTS;

AND

WILLIAM McCLINTOCK AND OTHERS . . RESPONDENTS.

BROWNE AND OTHERS . . . . . APPELLANTS;

AND

J. AUGUSTUS McCLINTOCK AND OTHERS . RESPONDENTS.

Order on farther Directions—Practice.

A cause petition was presented in *Ireland* to set aside certain sales of property made many years ago, in which the petition alleged that *B.* was the real purchaser, though the purchases were made in the name of *U.* The Lord Chancellor directed certain issues to be tried to ascertain the facts. The jury found that all the sales, except one, had been made as alleged, but that that one was a sale in which *U.* was the real purchaser. A motion was made before the Lord Chancellor for a new trial, which he refused to grant. The cause afterwards came on before the Vice-Chancellor on farther directions, when His Honour, after reviewing all the evidence and the affidavits on both sides, expressed his belief that though the one excepted purchase had really been made by *U.* it was so made on a secret understanding between the parties that it should afterwards be transferred by *U.* to *B.*, and he made an Order declaring all the purchases void.

Held, that this Order, proceeding on a point not raised in the cause petition, so far as it related to the excepted purchase, could not be supported.

[See the second case between the same parties, *post*, p. 456.]

IN these two cases proceedings had been instituted to set aside purchases of shares of estates, made under orders of sale in the Court of Chancery in *Ireland*, on the grounds that such purchases had been, though in the name of another person, really made by *John Browne*, for his own benefit, he being the Plaintiff in person and the solicitor in the causes in which such sales were ordered, and that such purchases were illegal, and fraudulent on the Court, he having never obtained the permission of the Court to bid at the sales (1).

The facts of the two cases were these:—

Cornelius Helden, who was seised in fee simple of lands in the

(1) The two causes were in substance the same, but *William McClintock* had a separate and individual interest in *Martha Helden's* share, while as to the other property he had a common interest with the other Respondents.

county of *Leitrim*, and of terms of years in lands in the county of *Longford*, and also of property in the *West Indies*, had a wife, *Martha*, and three daughters, *Mary*, *Sarah*, and *Sophia*. By his will, dated the 10th of February, 1798, he devised his *Leitrim* estate, with his other property, to his wife and to his three daughters in equal shares. By a codicil dated on the same day, in consideration of his daughter *Mary* being his eldest daughter, he bequeathed to her a sum of £1000, charged upon all his real and personal estate.

The testator died on the 17th of May, 1798, leaving his wife and his three daughters him surviving.

In the year 1803 a marriage was proposed between *Mary*, the eldest daughter, and *William Forster McClintock*. *Mary* was then a minor, and articles of marriage were executed, to which *W. F. McClintock*, of the first part, *Mary Helden* (the intended wife) of the second, and *Martha Helden* (her mother) of the third, were parties. By these articles it was stipulated that *Mary's* one-fourth and *Martha's* one-fourth of the *Leitrim* estates should be put in settlement, and also their shares in all other the estate of *Cornelius Helden* devised to them by his will. The articles were to be carried into effect by a deed of settlement.

This settlement was executed on the 14th of July, 1804, and thereby the two fourths of the *Leitrim* estate with the other properties devised to *Martha* (the widow) and *Mary* (the daughter), were, subject to an annuity of £400 for *Martha's* life and also subject to a charge of £6000 for younger children, limited to *W. F. McClintock* for life, remainder to his first and other sons in tail male, with remainders over. The deed contained a covenant by *Mary* that she would levy a fine to enure to the uses of the settlement. No fine, however, was levied. The marriage took place, and there were seven children who were the issue of it. These children were the Plaintiffs in the proceedings taken to set aside the sales.

Sarah married *Charles Coote*, and *Sophia*, in 1807, married *William Eden Lees*. The sales of their portions of the estates were under discussion, but for the purpose of this case (which relates to *Martha Helden's* share alone), need not now be farther referred to.

W. F. McClintock, conceiving himself to be entitled, in right of

1873
BROWNE
v.
MCCLINTOCK.

his wife, to the legacy of £1000, executed, on the 29th of August, 1812, an assignment of two-thirds thereof (£666 13*s.* 4*d.*) to *Robert Walpole*, and two other persons. And on the 25th of May, 1819, he assigned the remaining third (£333 6*s.* 8*d.*) to *John Browne*, a solicitor in *Dublin*.

In 1825, *Walpole* and his co-assignees took proceedings in the Court of Chancery in *Ireland* for recovery of the sum due to them on the assignment; and while the proceedings in their suit were still pending, they assigned to *Browne* all their interest.

In this way *Browne* became entitled to the whole of the legacy of £1000.

On the 30th of December, 1828, Mrs. *Martha Helden* mortgaged to *John Browne* her annuity of £400 created by the marriage settlement of *Mary Helden* with *McClintock*, and, by that settlement itself, charged upon the shares of both *Martha Helden* and *Mary*.

Browne having become entitled to all the interest of the *Walpoles* in addition to his own, presented, in 1839, a petition of revivor and supplement, praying to have the whole amount due to him raised by sale of the property on which the legacy was charged.

This suit was, for convenience, called the legacy suit.

Browne had instituted a suit in respect of what was due to him on the mortgage of the annuity of £400, which had fallen very much into arrear. This suit was called the annuity suit. On the 2nd of June, 1840, a decree was pronounced in this cause, directing accounts, &c.

On the 23rd of October, 1840, Mrs. *Martha Helden* died, intestate, and the annuity thereupon came to an end.

By a decree in the legacy suit made by the Lord Chancellor of *Ireland* on the 14th of August, 1844, the rights of *Browne* were declared, and to satisfy his claims a sale of what had been the testator's personal estate of *Ballinlough*, in the county of *Longford*, was ordered, and it was referred to the Master to report whether any and what real and freehold estates of the testator were charged with the legacy, and all usual accounts were directed, and farther directions were reserved.

On the 12th of February, 1845, a decree was made in the annuity suit, declaring the annuity well charged upon the lands belonging to *Martha Helden*, and directing accounts and a sale of

the lands chargeable with the annuity, reserving farther directions.

The lands of *Ballinlough*, part of the personal estate of the testator *Cornelius Helden*, were, on the 14th of August, 1845, sold for £550 to *Benjamin Humfrey*, in trust, as it was declared at the sale, for *John Unsworth*; but this sale was afterwards, by consent, set aside, and the lands again put up to sale. This was done on the alleged ground that they had been sold at an under-value, but on the second occasion they were sold to the tenant himself, and produced £100 less than on the previous occasion.

Under a decree made on the 12th of April, 1845, and a subsequent Order on the 27th of November, 1845, certain of the lands chargeable with the annuity were, upon the 18th of April, 1846, put up for sale, and, according to the Master's sale book of that date, "*B. Humfrey* in trust for *John Unsworth*" was declared the purchaser for a sum of £1300.

On the 27th of May, 1846, the two fourths of the *Leitrim* estate belonging to Mrs. *Mary McClintock* and Mrs. *Sarah Coote* were (under proceedings) put up for sale, but for under-value and want of bidders the sale was postponed. On the 20th of June, 1846, they were again put up, and the share of *Sarah Coote* was sold to "*Daniel O'Rorke*, in trust for *John Unsworth*," for £1350; and the share of *Mary McClintock* was sold to the same *Daniel O'Rorke* for the same *John Unsworth* for £1450. On the 4th of July, 1846, there were lodged in Court, in *John Unsworth's* name, to the credit of the cause, two sums of £337 10*s.* and £362 10*s.* in respect of these two purchases.

Upon a consent given on the part of *Mary McClintock*, which was made a rule of Court on the 14th of June, 1847, *John Unsworth* was allowed to give his promissory note for £1087 10*s.*, with interest at 5 per cent. for the remaining three-fourths of the purchase-money, "the Plaintiff *John Browne*, the only reported creditor, hereby consenting to receive the said promissory note in payment of the sum decreed and costs, &c." On receiving the £362 10*s.* on account of her one-fourth of the purchase-money, *Mary McClintock* was ordered to execute to the purchaser a conveyance of that fourth at the charges of *John Browne*, and *Browne* was authorized to receive the amount of *Unsworth's* promissory

1873
BROWNE
v.
McCLINTOCK.

note. *Martha Helden's* share was formally conveyed to *Unsworth* by a deed dated the 27th of December, 1847.

By a deed dated the 2nd of February, 1848, made between *John Unsworth* and *John Browne*, the former granted to the latter the share of *Martha Helden* and the share of *Mary McClintock*, which had been purchased in the name of *Unsworth* at the sale on the 18th of April, 1846.

On the 28th of April, 1848, a Side Bar Order was obtained, in the name of Mr. *Barker*, who was therein described as *Unsworth's* solicitor, to put *Unsworth* into possession of the lands constituting the one-fourth devised to Mrs. *Martha Helden* under her husband's will. *Browne*, under the conveyance from *Unsworth* of the previous 2nd of February, was then in actual possession thereof, and so continued till his death.

Browne died on the 14th of December, 1854, and the present Appellants, his wife and daughters, under his will entered into possession of all his property.

The cause petition was filed on the 7th of March, 1867. Its object was to set aside the sale of three-fourths of an undivided one-fourth share of lands in the county of *Leitrim*, sold on the 18th of April, 1846. The petition alleged that this one-fourth share had been purchased by *Browne* under a decree for sale made in causes entitled *Walpole and Others* v. *McClintock* and *Browne* v. *McClintock* (the annuity causes), and that at the time of the purchase, and down to the completion thereof, *Browne*, who was then, and had been for many years, a practising solicitor of the Court, was the Plaintiff in person in the said causes, and had the carriage thereof and all the proceedings therein; that he did not obtain from the Court any leave to bid at the sale or to purchase the property, but that he did bid in the name of a third person, namely, *John Unsworth*, his brother-in-law, who was declared the purchaser; that there was a studied concealment of the facts from the bidding to the date of the injunction for possession; that *Browne*, while using the name of *Unsworth* in the proceedings, was in truth and in fact himself the purchaser, and that such conduct was a fraud upon the parties and the Court, and was contrary to the principles of the Court affecting persons in a fiduciary position.

There was a similar charge made by the bill as to the sale of

the share of *Mary* and as to the sale of the share of *Sarah* upon the 24th of June, 1846, when *David O'Rorke* was declared the purchaser, but, as the bill alleged, only so declared nominally in trust for *Unsworth*, who, however, really purchased in trust for *Browne*, without any leave being obtained from the Court, and upon a concealment of the fact from the Court that such purchase was in trust for *Browne*.

The bill charged that these sales to *Unsworth* were made in pursuance of a concerted scheme or plan, by which it was intended that *Browne* should become the owner at an under-value, through a sale made without substantial opposition, and without the necessity for the payment of any purchase-money; that the said plan was a fraud on the parties in the cause and upon the Court.

The prayer of the bill was that it might be declared that the sales to *Unsworth* were really made to him in trust for *Browne*, and were fraudulent and void, and that the sales might be set aside, and that the shares might be declared to be held by the *Brownes* in trust for the *McClintocks*, and that accounts might be taken, and for farther relief.

The Defendants by their answering affidavit filed on the 2nd of July, 1867, denied that any one of the purchases was made only nominally for *Unsworth*, and alleged that all were in truth made really and solely for him, and they denied that they were made colourably for *Browne;* and they said that *Browne* did not obtain leave from the Court to bid as a purchaser, because he never intended to be the purchaser; and they denied the under-value. They alleged that their own title was under the conveyance made by *Unsworth* to *Browne* on the 2nd of February, 1848, and also under *Browne's* will.

The answering affidavits also set out allegations (afterwards made the subject of evidence in support of the fairness of the sales to *Unsworth*) that *Unsworth* had long desired to purchase some land in *Ireland*, and had spoken to *Browne* on the subject long before any of the sales in question; that the purchases had been made in consequence of this desire; that *Unsworth* afterwards became dissatisfied with his purchases because of a claim made upon him for money demanded in respect of these lands, as due to the Crown; and that, to conciliate *Unsworth*, who was a wealthy man, *Browne*

1873
BROWNE
v.
MCCLINTOCK.

consented, though unwillingly, to take the purchases off his hands. The Defendants alleged that the purchase of *Martha Helden's* share was not made, directly or indirectly, in the name of *Unsworth* in trust for *Browne;* and as to the supposed under-value, that considering the depreciation of land at the time of the sale, the impoverished condition of the estate, and the necessity for a large outlay thereon, it was bought at full marketable value; that the Plaintiffs, having with a full knowledge of all the facts lain by for a period exceeding twenty years from the time of the sale, and until after the death of *Browne* and of others conversant with the proceedings, were now, upon the ground of acquiescence, precluded in equity from any relief whatsoever.

Upon the 12th of August, 1868, the Lord Chancellor *Brewster* made an Order for the trial of certain issues of fact. The Order concluded with the words: "And the Court doth reserve farther Order, with liberty for either party to apply, as occasion may require, in the meantime."

The issues to be tried as directed by the Lord Chancellor *Brewster* on the 12th of August, 1868, were: 1. Whether, on the 18th of April, 1846, *Unsworth* purchased, on his own behalf, the shares of *Martha Helden.* 2. Whether he gave, previous to the 18th of April, any authority to *Humfrey* to purchase them for him. 3. Whether, on the 18th of April, he purchased, on his own behalf, the share of *Sarah Coote.* 4. Whether, previous to the 18th of April, he gave authority to *Humfrey* to purchase *Sarah Coote's* shares for him. 5. Did *Unsworth* lodge in Chancery, of his own proper money, the £337 10s., the purchase-money of *Sarah Coote's* share? 6. Did *Unsworth,* on the 20th of June, 1846, purchase, on his own behalf, *Mary McClintock's* share? 7. Did he, before that 20th of June, give *Humfrey* authority to purchase for him that share? 8. Did he lodge in the Court of Chancery the £362 10s. of his own proper money, the purchase-money of that share? 9. Did *John Browne* make, or cause to be made, all or any of the said purchases in the name of *Unsworth,* but in fact and truth on his own behalf and for his own benefit? And the affirmative of these issues the Court declared to lie on the then Defendants (the present Appellants), whom it directed to appear as Plaintiffs in the issues. Those issues came on for trial before the Lord Chan-

cellor *Brewster* on the 2nd, 3rd, and 4th of December, 1868, when the jury found, on the 1st issue, that *Unsworth* did purchase *Martha's* share on his own behalf; on the 2nd issue, that *Unsworth* had given authority to *Humfrey* to purchase it for him; on the 3rd and 4th, that *Unsworth* did not purchase *Sarah Coote's* share for himself; on the 5th, that the money lodged in respect of that purchase was not his own money; on the 6th and 7th, that the purchase of *Mary McClintock's* share was not for him; and on the 8th, that the money lodged for that purpose was not his money. On the 9th issue the finding was "that *Browne* made, or caused to be made, all of the said purchases except the first, being *Martha Helden's* share, in the name of the said *John Unsworth*, but in fact and in truth on his own behalf and for his own benefit."

In the course of the trial a note addressed by *Unsworth* to *Humfrey* was put in evidence. It was as follows:—"*Liverpool*, 15th April, 1846. Sir,—I hereby authorize you to bid for me for the lands of *Augerlough* and the other lands in the county *Leitrim*, advertised to be sold under the decree in these causes, on the 18th inst., in Master *Goold's* office.—Your obedient *John Unsworth*." In making his report of the trial the Lord Chancellor *Brewster*, after stating what he believed to have influenced the minds of the jurymen as to *Martha Helden's* share, expressed his own opinion "that there was sufficient ground for coming to the conclusion that *Unsworth* was not the real purchaser of Mrs. *Helden's* one-fourth." He added, "The question, however, was one for the jury. I may add, that, had the evidence given at the trial been before me at the hearing of the cause, I should not have thought of directing an issue."

Notice was given on each side for a motion for a new trial, but the *McClintocks* withdrew their notice. The *Brownes* did bring on the motion before Lord Chancellor *O'Hagan*. Affidavits had been filed on both sides for the purposes of this motion, and one of these affidavits, on the part of the *Brownes*, put forward a letter alleged to have been written by *Unsworth* to *John Browne* on the 15th of December, 1845, and to have been only recently discovered among his papers. The material part of that letter was as following:—"My dear *Browne*,—I now return you the receipts, and

1873

BROWNE v. MCCLINTOCK.

it would be as well if the affair was closed, in any way you choose. I also note your remarks about the *Leitrim* estate, of which please keep me advised.—*John Unsworth.*"

On the 30th of April his Lordship made an Order refusing the new trial.

The cause afterwards came on before Vice-Chancellor *Chatterton*, on the 20th of July, 1870, when the Vice-Chancellor, expressing an opinion that the sale to *Unsworth* of *Martha Helden's* share was made on a secret understanding that the property was to be transferred by him to *Browne*, and that the sale and conveyance were fraudulent and void, made a decree by which that as well as all the other sales were ordered to be set aside; and accounts were directed in respect of all the transactions.

The decree of the Vice-Chancellor, so far as it reversed the finding of the jury with regard to the sale of *Martha Helden's* share, was first argued.

Mr. *Fry*, Q.C., and Mr. *Bennett Campion*, Q.C. (of the Irish Bar), for the Appellants:—

The Vice-Chancellor's decree as to the share of *Martha Helden* cannot be supported. It is not justified by the evidence as to any of the purchases, but it is clearly wrong when it treats as erroneous the findings of the jury with relation to *Martha Helden's* fourth share. If the verdict on that part of the case was intended to be impeached there ought to have been a new trial, but the new trial was refused, and, after that, the cause could only be farther dealt with on the footing of the findings as they stood. The Vice-Chancellor had nothing to do but to apply those findings according to the rules of a Court of Equity. Instead of applying them he has reversed them, thus placing himself above the Lord Chancellor and the jury, and overruling both. The Vice-Chancellor could only take the decree of the Lord Chancellor and the findings of the jury as his guides. He could not go out of them and form his own estimate of the evidence, and on that estimate alone come to a conclusion the opposite of that at which the jury had arrived. In *Fernie* v. *Young* (1) this House declared that, on appeal against a decree, this House itself could only look to the decree, and not

(1) Law Rep. 1 H. L. 63.

to any extraneous matters; but here the Vice-Chancellor—who had no right nor authority to do more than to apply the rules of Equity to the findings placed before him, which findings were in fact binding upon him—took upon himself to put his own construction upon the facts proved at the trial, and to come to a conclusion different from that at which the Lord Chancellor and the jury had arrived. Though he did not affect to deny the finding that, in fact, *Unsworth* did purchase for himself the share of *Martha Helden*, he chose to assume that purchase as having been made with the ultimate purpose of being transferred to *Browne*, and, upon this gratuitous supposition, reversed the finding of the jury. This was raising a new point in the case, which it was not within his competence to raise. The case of *Atkin* v. *Delmege* (1) is not applicable to a case like the present. There the purchase was made by the solicitor for the Plaintiff, that solicitor having so conducted the sale as to depreciate the value of the property, which he then purchased in secret for himself. The Plaintiff afterwards found out the real facts, and brought a bill to have the purchase set aside; and it was set aside, the proof of the fraud committed by the solicitor against his own client being complete. There is nothing of the kind here. It is, on the contrary, expressly found that *Martha's* share was not purchased for the solicitor or by the solicitor, but for a third person; yet the Vice-Chancellor, without anything to justify him in doing it, has treated the purchase as fraudulent, and the finding upon it as erroneous. So likewise *Morrison* v. *Barrow* (2) is inapplicable, because there the Court of Equity in substance set aside the verdict, and declared that the issue itself had been granted by mistake, and that the agreement —specific performance of which was there sought—was one which could not be performed. In *Armstrong* v. *Armstrong* (3) the question was as to the illegality of an asserted partnership, and the Court held that if the partnership as a matter of fact really existed, it was contrary to public policy and to the statute, and therefore, though the partnership was established as a mere fact, the decision of the Court proceeded on the law, which was properly applicable to it. Here there has been no question of law,

(1) 12 Ir. Eq. Rep. 1. (2) 1 D. G. F. & J. 633.
(3) 3 My. & K. 45.

1873

BROWNE v. MCCLINTOCK.

but finding has been utterly disregarded, and on an imaginary state of facts the Vice-Chancellor has founded his decree. The directing of the issue here must be taken to have been equivalent to a declaration by the Lord Chancellor, that the question of title to the relief sought by the bill depended entirely on the fact whether the purchase was made by *Unsworth* on his own account, or by him in trust for *Browne*. That fact having been found one way by the jury, and the Lord Chancellor having adopted the finding—which he did by refusing a new trial of the issues—it was beyond the power of the Vice-Chancellor to take his own view of the evidence, and to treat as utterly nugatory the finding which he had no authority to set aside, and which indeed in one part of his judgment he professed to hold as binding upon him. The issues directed by the Lord Chancellor exhausted all the equities alleged on the face of the bill. The Vice-Chancellor introduced a new ground for relief into the case, and on it made his decree. He had no power to do so, and his decree cannot be supported.

Mr. *Kay*, Q.C., and Mr. *E. Cutler* for the Respondents:—

It is surprising to hear the contention that under the circumstances which exist in this case, where there was only an interlocutory Order of the Court, for the Order directing the issue was no more, it was not open to the Vice-Chancellor on the farther hearing of the cause to determine any question which properly presented itself for consideration. The Lord Chancellor, who directed the issue, and tried the cause, expressed an opinion on its substantive merits, when he intimated that as to *Martha Helden's* share he should not have found as the jury did. That left to the argument on the farther hearing the full consideration of the facts. Certain disputed facts had been ordered to be submitted to a jury trial. A verdict was given—it required to be applied. It came before the Court again as a matter of necessity, and the Court was entitled to exercise its jurisdiction, the ordinary jurisdiction of a Court of Equity, with regard to the finding of the jury. The old form always was to reserve the equities for farther directions. The Order for the trial was only interlocutory. In *Daniell's* Chancery

Practice (1) it is said, "A decree is either interlocutory or final. An interlocutory decree is when the consideration of the particular question to be determined, or the farther consideration of the cause generally, is adjourned till a future hearing. The farther hearing is then termed a hearing upon farther consideration, or upon the equity reserved."

Under the old practice, though trials of fact were held before the Common Law Courts, yet the motions for new trials were always made before the Court of Equity, which reserved all matters for its own final decision; thus it laid down a rule, not recognized in a Court of Law, that an heir-at-law might be allowed more than one trial in a suit instituted by him to set aside a will. Here the Order for the trial was made before the hearing of the cause. The practice of the Court of Equity in such a case, is thus described by *Daniell* (2). "If the Order for the trial of a question of fact has been made before the hearing, the cause must be brought to a hearing in the usual way, and the verdict upon the trial will form part of the evidence (*Seton*, 869, No. 7); but if the trial or assessment of damages has been directed at the hearing, the cause must be set down for farther hearing (*Seton*, 971–992, 994) before the Judge to whose court the cause is attached (Orders, vi. 5), though it seems that it should not be set down for hearing on the same day as the trial of the question of fact: *Fernie* v. *Young*" (3). And again (4), "Where the whole matter is before the Court, with sufficient precision to enable it to come to a satisfactory decision without another reference to a jury, a decision contrary to the verdict," may be pronounced. That shewed that what was done before the trial was not to make the decree a final decree, in the ordinary sense of the word, for if there had been such a decree made before the trial, there could not have been, after it, a decree dismissing the bill. If there was farther consideration, or farther hearing, or equity reserved, the bill might be dismissed. The power of the Court having in any of these ways been reserved, the Court might decide against the verdict or dismiss the bill altogether. [LORD CHELMSFORD:—If the issues cover the whole matter in dispute, and are found in one way, can

(1) Page 850, ed. 1871.
(2) Chan. Prac. p, 1015, ed. 1871.
(3) Law Rep. 1 H. L. 63. 12 Jur. N.S. 437
(4) Chan. Prac. 1016, ed. 1871.

1873
BROWNE
v.
McCLINTOCK.

the Court without a new trial make a decree opposite to that finding ?] It can, for the Court of Equity is master of the cause, and the issue is merely directed to assist it in determining on a particular question of fact. When a case comes back the Court may direct a new trial, or a new issue, in such form as it pleases. It may direct any number of trials. In *Evans* v. *Prothero* (1) there were no less than three trials, and the application for a fourth was refused, not on the ground of any doubt as to the power of the Court to grant it, but on the ground that the Lord Chancellor exercised his own judgment on a point of evidence, and thought that a certain paper, the contents of which had influenced the minds of the jurors, was not inadmissible. *Armstrong* v. *Armstrong* (2) equally shewed that the Court of Equity had full authority over the cause as well after as before the trial of the issue, and there the issue covered the whole question in the cause, and though the jury had found that there was a legal partnership, the Vice-Chancellor *Leach* held that there was not, and there too the question itself had been before the Court at the original hearing.

Simpson v. *Holliday* (3) went much farther than this case, and shewed that not merely the Court which directed the issue but even a Court of Appeal might, on a consideration of all the circumstances, give a judgment entirely setting aside the verdict which had been pronounced on the trial. Here the Lord Chancellor might have given judgment, even a Court of Law often did so —notwithstanding the verdict. He was not bound to adopt the verdict; as to the exercise of his jurisdiction it had no conclusive authority. The Vice-Chancellor here was exercising the jurisdiction of the Court, and it cannot be said that he could not, while the verdict stood, give judgment in opposition to it. It is not necessary that in such a case the verdict must in form be set aside: *O'Connor* v. *Malone* (4). It is clear that he might on declaring himself dissatisfied with the verdict, have granted a new trial, and the verdict would be deprived of all binding effect. The object of a trial being to satisfy the conscience of the Court,

(1) 1 De G. M. & G. 572.
(2) 3 My. & K. 45.
(3) Law Rep. 1 H. L. 315.
(4) 6 Cl. & F. 572. See *McGregor* v. *Topham*, 3 H. L. C. 132; *Swinfen* v. *Swinfen*, 27 Beav. 148.

1873

BROWNE v. MCCLINTOCK.

if the verdict does not satisfy it the Court may disregard the verdict.

The issue here was rightly framed, and really raised the question of the validity of the whole transaction. The word "purchase" is not confined to the mere moment of the auction—it ranges over the whole time from that moment till the final confirmation of the sale. The man who made the highest bid was not the purchaser till the report was confirmed, and could not, till then, make a title to the property which was the subject of his bidding. He could not, therefore, transfer his rights to any one else till then, and his attempt to do so really amounted to a re-opening of the whole transaction. During all that time it was the duty of the solicitor to keep the Court informed of all those circumstances which might enable it to secure the highest bidding for the property. But *Browne*, acting for himself, though in the name of his relation *Unsworth*, had done the reverse of this. The confirmation order was not made in this cause for more than a year after the sale had taken place, and the Vice-Chancellor had a right to treat all the acts occurring before the confirmation as acts constituting the purchase—and to declare that in his judgment the purchase thus understood was really made for *Browne* though in the name of *Unsworth*. On a motion for a new trial before the Court of Appeal, the Court will not consider whether the finding was proper, but merely whether there was sufficient evidence to warrant the verdict: *Penn* v. *Bibby* (1).

1873

July 29.

LORD CHELMSFORD:—

My Lords, upon the question upon which the House desired to hear Counsel, as preliminary to the inquiry into the merits of the case, I entertain no doubt that the decree of the Vice-Chancellor cannot be supported.

The object of the cause petition was to set aside the sale of one-fourth of certain lands devised by the will of *Cornelius Helden* to his wife *Martha Helden* as fraudulent and void. The case laid by the cause petition is this: that "Upon the 18th of April, 1846," "the undivided one-fourth of the lands devised by the will of *Cornelius Helden* to *Martha Helden* was set up for sale," "and upon

(1) Law Rep. 2 Ch. Ap. 127.

1873
BROWNE
v.
MCCLINTOCK.

such sale *Benjamin Humfrey*, a solicitor, was declared the purchaser of the said one-fourth for the sum of £1300, in trust for the said *John Unsworth*, brother-in-law of the said *John Browne*." And then the Petition charges "that the said purchase, made nominally in trust for *John Unsworth*, was actually and substantially made in trust for *John Browne*, the Plaintiff and solicitor in person in two of the said causes, and that the said *John Browne* did not obtain any leave from the Court to bid at the said sale."

Now Mr. *Kay* has very ingeniously argued that the word "purchase" here has a wide meaning ranging over the whole period between the bidding and the confirmation of the purchase. And I have no doubt that with a fit context the word "purchase" may have that meaning. But the question is, what is its meaning in this cause petition? It appears to me to be perfectly clear that it applies entirely to that sale, as it is called, which took place on the 18th of April, 1846, before the Master. "Upon such sale" the cause petition says, "*Benjamin Humfrey* was declared the purchaser" "in trust for *John Unsworth*," the brother-in-law of *Browne;* and then it says that "the said purchase," &c. (what do those words "the said purchase" mean? why, the purchase upon the sale on the 18th of April, 1846,) "was actually and substantially made in trust for the said *John Browne*, the Plaintiff and solicitor in person in two of the said causes." I cannot understand it in any other sense than that the whole of it refers to what took place on the 18th of April, 1846, when the sale was made before the Master, and when the purchase was made in the name of *Unsworth*, which is declared to be "actually and substantially made in trust for the said *John Browne*."

Then the cause petition in another part of it states that the Petitioners "were not, until within a few months since, acquainted with the several facts and circumstances hereinbefore set forth in relation to the purchase by the said *John Browne;* and more particularly," they were were not "at all aware that the purchases so made were made by or in trust for the said *John Browne*." And the Petitioners "charge that the same were so made in pursuance of a concerted scheme or plan by which the said *John Browne* might become the owner of the lands for an under-value at a sale without substantial competition" (that must mean a sale by

auction) "and without the necessity for the payment of any purchase-money." And then "your Petitioners have been advised that it was not competent to the said *John Browne* to purchase at the said sale without having first obtained the leave of the Court to bid, which he did not apply for or obtain." And the prayer is, "to declare that the sale to the said *John Unsworth*, in trust for the said *John Browne*, of the said *Mary McClintock's* undivided one-fourth part and share," and so on, "was fraudulent and void."

Now can there be the slightest doubt as to what the exact meaning of that cause petition is, and that it charges, in respect of the only share to which our attention is directed in the present suit, namely, the share of *Mary Helden*, that that was purchased at the sale on the 18th of April, 1846, by *Unsworth*, not on his own account, but in trust for *John Browne?* That was, therefore, the question to be tried.

The cause having been heard before the Lord Chancellor of *Ireland* for several days, his Lordship at last directed certain issues to be tried, and those issues, as far as relates to the share of *Mary Helden*, are in this form: "Whether the said *John Unsworth*, on the 18th day of April, 1846, purchased on his own behalf, and for his own benefit, and not in trust for any other person or purpose, the one-fourth of the lands and premises in the pleadings mentioned, being the share thereof of *Martha Helden?*" Secondly, "Whether the said *John Unsworth* gave any and what authority to *Benjamin Humfrey* previous to the 18th day of April, 1846, to purchase on his behalf the said one-fourth share of the said lands and premises in the pleadings mentioned, being the share thereof of *Martha Helden?*" And in the ninth issue, "Whether or not did the said *John Browne* make or cause to be made all or any of the said purchases in the name of the said *John Unsworth*, but in fact and truth on his own behalf, and for his own benefit?"

The jury found on the first issue, "That the said *John Unsworth*, on the 18th day of April, 1846, purchased on his own behalf and for his own benefit, and not in trust for any other person or purpose, the one-fourth of the lands and premises in the pleadings mentioned." And on the second issue, "That the said *John Unsworth*, by letter of the 15th day of April, 1846, gave authority to *Benjamin Humfrey* to purchase on his behalf the said one-fourth

1873

BROWNE v. MCCLINTOCK.

share." As far as the ninth issue is concerned the jury found, "That the said *John Browne* made, or caused to be made, all of the said purchases, except *Martha Helden's* share, in the name of the said *John Unsworth*, but in fact and in truth on his own behalf and for his own benefit." The findings appear to me completely to cover the whole case which is laid by the cause petition, namely, whether, in point of fact, the purchase on the 18th of April, 1846, was made by *John Unsworth* in trust for *Browne*.

That being so, the case comes before the Vice-Chancellor of *Ireland* upon farther directions, and His Honour holds, and properly holds, that he is bound by the verdict which has been pronounced. He says that he has no doubt whatever that the purchase in *Unsworth's* name was for *Browne;* but he adds: "The jury, however, have found otherwise, and I cannot deal with it save according to their verdict." Then, being concluded by the verdict of the jury, and that verdict of the jury covering the case laid upon the cause petition, I apprehend that the Order which the Vice-Chancellor made was upon a totally different ground, and one which was not raised at all by the cause petition. I have no doubt that a case might have been laid by the cause petition (whether it would have succeeded or not, I am not here to say), that there was a preconcerted scheme that *Browne* should become the owner of all these shares, and that he should so become after a purchase made by *Unsworth* in his own name. But that not being the case laid by the cause petition, the Vice-Chancellor, in my opinion, was not justified in saying: "I have now gone fully through the facts of this case, and I have carefully read all the documents having any bearing on the questions I have to decide, and I have been led to the conclusion that Mr. *Browne* contemplated, from an early period, becoming the owner of *Martha's* share as well as of the others, and that although *Unsworth* may have at first thought of buying for himself, *Browne* expected to become the owner of that share also;" and then in acting upon that and deciding, as he did, that the purchase was void, he says: "The policy which avoids such original purchase, must attend to such secret substitutions; and the arm of the Court would be short indeed to check such frauds if it were not able to lay hold of the case when a solicitor, having the carriage of a sale, traffics secretly

with the buyer whose bidding may have been but just accepted and keeps up the pretence of the other being still the purchaser."

As I have said, that case is not at all laid by the cause petition. If it had been laid, as it might have been, the question for consideration would have been a very different one; but it being clear that the cause petition was, as I have said, completely disposed of (if I may use the expression) by the verdict of the jury found upon the issues directed by the Lord Chancellor, I submit to your Lordships that the decree of the Vice-Chancellor cannot be upheld. I therefore submit to your Lordships that the course to be pursued will be to reverse that decree, and declare the petition in the Court of Chancery in *Ireland* should be dismissed with costs, such costs to include the costs of the first and second issues and the part of the ninth issue found for the Defendants; but that the Defendants ought to pay to the Petitioners the costs of the other issues in the suit, and the costs of the motion of the 30th of April, 1870, for a new trial of such other issues; such last-mentioned costs to be set off; and with that declaration to remit the cause to the Court of Chancery in *Ireland*.

LORD COLONSAY:—

My Lords, I am far from denying that if we had before us upon this record the case which is presented by the Vice-Chancellor in his judgment, there would be a great deal in it to support the conclusion at which he has arrived. That, however, is not the case before us. It appears to me that we are to be limited in our consideration of the matter to the cause petition, to the issues which have been directed, and to the verdict which has been returned upon those issues, and we have to see how those apply to the case.

I cannot read the cause petition as comprehending the case which the Vice-Chancellor has presented as the ground of his judgment. It appears to me that the cause petition contemplates the case of a transaction in the bidding at the sale whereby a purchase was then made, not by the person in whose name it professed to be made, but by *Browne* himself. That is the case presented in the petition, and when we look onwards through it from the point where that is stated, it is always said "such purchase" and "such sale," and so on; all meaning what took place at that point of

1873
BROWNE
v.
MCCLINTOCK.

time and referring to the condition and meaning of the parties when that bidding and declaration of purchase was made.

Now, my Lords, I think it is clear that that was the view which the Lord Chancellor took of the matter, because he considered what would be the proper issues for the trial of the question, and considering the question raised upon the cause petition to be what I have stated it to be, he framed these first, second, and ninth issues, which I think were very excellently framed in order to try that question. I am not familiar with the course of practice in *Ireland*, but I apprehend that if either of the parties had been of opinion, before the case was sent to the jury, that these issues were not suited to try the whole case, it was within their province to move to have the issues altered or adjusted. However, I can easily understand why that was not done; because I do not apprehend that at that stage of the proceedings any different view was taken of the import of that cause petition than that which I have now stated.

Well, then, that being so, and the jury having returned a verdict in favour of the party who was the actor in this one purchase, I think that that necessarily concluded that question, and I do not see that there was any ground for the Vice-Chancellor's not giving effect to the verdict of the jury, or that there is any ground upon which we can be now asked to disregard the verdict of the jury, and deal with the cause as if that verdict had not been pronounced; and the Vice-Chancellor himself says that that is not the way in which he intends to deal with the case. He says he intends to deal with the case assuming the verdict of the jury to be right; but he does in fact deal differently with it—he deals with a case which he states, and which might be a good case if the facts warranted it, but which is not the case set forth in the cause petition.

Therefore, my Lords, I am of opinion, with my noble and learned friend who has addressed your Lordships, that the judgment cannot stand.

LORD CAIRNS:—

My Lords, I rather gather from the judgment of the Vice-Chancellor that his attention was not particularly directed to the question of whether the case upon which his judgment proceeded

really was the case raised by the pleadings in this suit. I also, like my noble and learned friends who have preceded me, am far from saying (and I do not wish to be understood to say) that if the case which was stated by the Vice-Chancellor, and upon which he proceeded, had been alleged in the pleadings, and had been proved upon the evidence, there would not have been a good foundation for the decree which he made. But the preliminary question which your Lordships desired to be argued in the case is this: Is the case upon which the Vice-Chancellor proceeded open upon the pleadings in the suit?

My Lords, I do not propose to read what has been read already, but it appears to me to be clear beyond doubt that if you take the pleadings in the case from the commencement of the 31st paragraph to the close of the 37th paragraph, and then the 45th paragraph also, the petition presents a simple, clear, unvarying, and precise case, alleging that at the sale by auction, on a particular date, of this property, *Browne*, who is represented by the Appellants, became the purchaser in the name of *Unsworth;* and that the effect of that was that the sale was made at that time at an under-value, without substantial competition, and without *Browne* having the leave of the Court to be a purchaser. That is clearly an intelligible proposition, when it is remembered that *Browne* was the Plaintiff in the suit and had the carriage of the sale.

My Lords, I hold certainly that the first object of pleadings is to inform the persons against whom the suit is directed what the charge is which is laid against them; and that it is the duty of the Court upon the one hand to take care that no mere technicality should be allowed to defeat the just result of the case alleged, if the truth of the case, as alleged, is in substance established; but that, on the other hand, if the case upon which the Plaintiffs desire to proceed is not alleged in substance, it is not in the power of the Court, consistently with justice and fair dealing, to allow another case to be pressed upon the Defendants, in consequence of facts which may either come out in the process of investigation, or, as was the case in the present instance, as it seems to me, by a kind of after-thought, the original case upon which the parties founded their first contest, having entirely failed.

It appears to me that when this case came originally before

1873
BROWNE
v.
MCCLINTOCK.

the Lord Chancellor, his Lordship thought, and every person in this suit thought, that the question, and the only question, to be decided was: Aye or no—Did *Browne* purchase this property at the sale by auction in the name of *Unsworth?* Every one at that time thought that that question would be decided, and that thereby the suit would be decided, by the findings upon the issues, and it was not until after the jury, upon grounds which are not now open to investigation, decided the particular issues as to *Martha Helden's* property against the Petitioners, that it seems to have entered into the minds of their legal advisers that, consistently with that finding of the jury, they might raise another case which never was raised upon the pleadings, and obtain a decree upon the considerations which pressed upon the mind of the Vice-Chancellor.

My Lords, I think that great injustice would be done if a case of that kind, entirely different from the case set up by the pleadings, was now to be admitted; and I therefore entirely agree with the motion made by my noble and learned friend that this decree should be reversed.

LORD HATHERLEY concurred.

Mr. *Fry*:—Will your Lordships allow me to make one observation upon the form of Order with reference to its possible bearing upon the next part of the case? Your Lordships, as I understand, propose that the Respondents are to pay the costs of the motion for a new trial, referring, as I understand, to the Order made in both the cases on the 30th of April, 1870.

LORD CAIRNS:—The motion for a new trial of those issues which was found against the Respondents.

Mr. *Fry*:—With regard to *Mary's* share?

LORD CAIRNS:—Yes.

Mr. *Fry*:—*Sarah's* share, as your Lordships know, is not in issue in either suit; will your Lordships direct us to pay the costs with regard to *Mary's* share only?

LORD CAIRNS:—You will pay the costs of your motion which failed.

Mr. *Fry*:—The motion was made with respect to the verdict in the suit now before your Lordships upon appeal, and to that suit which will be shortly before you upon appeal. In that appeal it will be my duty to try to convince you that a new trial ought to have been granted.

LORD CAIRNS:—My Lords, I think the course that your Lordships might wisely take in this matter would be to suspend actually putting the question in this matter until the other part of the appeal has been heard. What your Lordships have said I think indicates sufficiently the course which, upon the merits of this case, your Lordships are likely to take.

The following Order was (after the argument and judgment in the second case) entered on the journals:—

> "That the said Order of the Court of Chancery in *Ireland*, of the 20th of July, 1870, complained of in the appeal, be and the same is hereby reversed: And it is declared that the cause petition in the Court of Chancery in *Ireland* be dismissed with costs, to be paid to the Respondents in the said cause petition by the Petitioners in the same, such costs to include the costs of the first, second, and the part of the ninth issues found for the Respondents in the said petition, and that the said Respondents (the Defendants in the suit) ought to pay to the Petitioners in the cause petition (the Plaintiffs in the suit) the costs of the other issues in the suit, and the costs of the motion of the 30th of April, 1870, for a new trial of such other issues, such last-mentioned costs to be set off. And it is farther ordered that the cause be and is hereby remitted back to the Court of Chancery in *Ireland*, to do therein as shall be just and consistent with this declaration and judgment."
>
> *Lords' Journals*, 4th August, 1873.

[This preliminary matter having been thus disposed of, the case was heard on the subject of so much of the decree as had sustained and enforced the findings of the jury upon the other parts of the case.]

1873

BROWNE v. McCLINTOCK.

BROWNE
v.
McCLINTOCK.

Bill to set aside Purchase for Fraud—Form of Issue—New Trial—Delay.

An issue directed by the Court of Chancery, in a case where the bill charges the Defendant with fraud in the purchase of land, is not defective in form because it directs the Defendant in the suit to support the affirmative of the issue and shew that the purchase which is the subject of the issue was made *bonâ fide*.

The Judge in Equity having directed an issue, possesses a larger discretion than does a Court of Common Law in determining whether the finding of a jury upon the issue is satisfactory. And a Court of Appeal will not interfere with the exercise of this discretion unless upon very strong and manifest reasons.

The fault of delay in seeking relief against a transaction charged as fraudulent, only begins to affect the complaining party after he has knowledge, or full means of knowledge, of the circumstances alleged as constituting the fraud.

Mr. *Fry*, Q.C., and Mr. *W. Bennett Campion*, Q.C., of the Irish Bar, for the Appellant:—

The present appeal relates to the sale of the share of *Mary*, and depends on the merits of the case. The Appellants contend that the judgment below was wrong, that there was no fraud; and that delay on the part of the *McClintocks* prevents them from seeking relief in a Court of Equity. The Appellants deny fraud or connivance of any sort. The evidence shews that the lands were not purchased at an under-value, and that they were not collusively bought by *Browne* on his own behalf. On the contrary, *Unsworth* was the real purchaser, and was represented by *Humfrey*. The letter to *Humfrey* of the 15th of December, 1845, recently discovered, and which is admissible as *noviter repertum*, leaves no doubt that *Unsworth* was desirous of purchasing land in *Ireland*, and that he authorized *Humfrey* to make the purchase for him. The only real connection which *Browne* had with these purchases, was when *Unsworth* began to think that he had involved himself in an unprofitable speculation, and desired *Browne*, over whom he possessed the influence often enjoyed by a wealthy relative, to take the purchases off his hands.

The Lord Chancellor ought not to have directed issues. [LORD CHELMSFORD:—Can that objection be raised after the issues have been tried, and a new trial has been refused?] It can:

Butlin v. *Masters* (1). Then the form of the issues was wrong. The Defendants in the suit ought not to have been made to maintain the affirmative of the issues. In all cases of this kind, the party complaining of a sale and seeking to set it aside has been held bound to prove unfair dealing and has been required to come at an early period for relief. Courts of Equity will not readily open up transactions where the party whose conduct is impeached has been in undisturbed possession of property for years, and has died in the possession of it. In *Champion* v. *Rigby* (2) a bill by the client himself against his solicitor for an alleged breach of duty of this kind, was dismissed for delay, on account of having been filed eighteen years after the act sought to be impeached. *Sibbering* v. *Earl of Balcarras* (3) was to the same effect. There the sale was of a life estate, subject to a reversion. The sale took place in 1822. The bill was filed by the reversioner in 1846, and no proper and satisfactory reasons being given to account for the delay,—and no satisfactory reason has been given here,—the bill was dismissed. So in *Roberts* v. *Tunstall* (4), the lapse of seventeen years was held to be a bar, and the poverty of the *cestui que trust* was held not a sufficient excuse for the delay, The evidence in such a case as the present must be clear; the Court cannot act on surmise alone: *Nicol* v. *Vaughan* (5). There was here, during all the life of *Browne*, complete acquiescence in what had been done, and the transactions cannot now be disturbed: *Gregory* v. *Gregory* (6).

Mr. *Kay*, Q.C., and Mr. *E. Cutler*, for the Respondents:—

The evidence here leaves no doubt of fraudulent dealing on the part of *Browne*, who, in his double capacity of Plaintiff and solicitor, was acquainted with all the facts, and took advantage of his situation to make a personal profit of the estate of which he was to conduct the sale. There is no ground for setting up here acquiescence or waiver. There was here no knowledge of the facts, and *Vyvyan* v. *Vyvyan* (7) distinctly establishes that waiver or

(1) 2 Phill. 290.
(2) 1 Russ. & My. 539.
(3) 3 De G. & Sm. 735.
(4) 4 Hare, 257.
(5) 1 Bli. (N.S.) 505; 2 Dow. & Cl. 420. See also 1 Cl. & F. 495.
(6) Coop. Ch. Cas. 201; Jac. 631.
(7) 30 Beav. 65; affirmed, 4 De G. F. & J. 183.

1873
BROWNE
v.
MCCLINTOCK.

acquiescence, like election, presupposes that the person to be bound is fully cognisant of his rights, and, being so, neglects to enforce them. And the *Marquis of Clanricarde* v. *Henning* (1) shews that the time from which the imputation of delay begins to arise runs from the discovery of the circumstances which constitute the right to relief. As soon as the circumstances here were known the suit was instituted. The onus of proving acquiescence lies on him who imputes it: *Wall* v. *Cockerell* (2). Mere delay does not prove it.

By every rule of the Courts, the transaction here appears to be invalid. The Landed Estates Court will not allow the party having the charge of the order for sale to buy up the charges on the estate at an undervalue, for his own benefit, pending the proceedings, and it is sufficient proof of undervalue if a greater sum is reported due on the charge than the amount, with interest, given for the estate: *Ronayne's Case* (3). That case declared a principle which had been previously adopted under curious circumstances. In *Popham* v. *Exham* (4) *A.*, a solicitor, having a charge on an estate, filed a bill in his partner's name to raise the charge; a sale having been decreed, *A.*, without obtaining the leave of the Court, and without disclosing the truth to the Master, purchased the lands in the name of *B.*, to whom the conveyance was made, while several subsequent proceedings in Court were taken in the name of *B.*, as if he was the real purchaser. After the deaths of *A.* and of his partner, and the lapse of nineteen years, the Court set aside the sale, although except in the concealment there was no evidence of fraud, and the estate was not shewn to have been sold at an undervalue. That case, although the circumstances much resembled those of the present, was a much stronger case in favour of the sale, for here the fraud on the Court was clearly proved, the conveyance from *Unsworth* to *Browne* being kept concealed, and the process of the Court being apparently set in motion to authorize *Unsworth* to take possession when he had already parted with all the interest he was ever pretended to possess. Here, too, the land was sold at an undervalue. That case expressly laid it down as the settled rule of the Court that a Plaintiff or his solicitor must

(1) 30 Beav. 175.
(2) 10 H. L. C. 229.
(3) 13 Ir. Ch. Rep. (N.S.) 444.
(4) 10 Ir. Ch. Rep. (N.S.) 440.

7 Jur. N.S. 1113
9 Jur. N.S. 447

1873
BROWNE
v.
MCCLINTOCK.

not bid at a sale without the leave of the Court, and that the fact of non-compliance with that rule vitiated the sale itself, in which case mere lapse of time would not preclude the right to relief. These authorities were in accordance with the rules stated in *Randall* v. *Errington* (1), and acted on in *Charter* v. *Trevelyan* (2), in which latter case, when in the Court of the Master of the Rolls (3), Sir *C. Pepys* said: "In cases of fraud I think time has no effect. Were it otherwise the jurisdiction of the Court would be defeated, not because the case was not one for its interference, but because the author of the fraud had been enabled to continue his deception till such a time had elapsed as to prevent the interference of the Court. Such fortunately is not the law, and those who may be disposed to appropriate to themselves the property of others may be assured that no time will secure them in the enjoyment of their plunder, but that their children's children will be compelled by this Court to restore it to those from whom it has been fraudulently abstracted." When that case came up to this House, Lord *Campbell* expressly quoted and adopted this expression of the rule of law, and Lord *Cottenham* declared his complete adherence to what he had thus stated at the Rolls (4). The principle was again declared and acted on in this House in the case of *Savery* v. *King* (5), and was applied by Lord Chancellor *Westbury* in *Rolfe* v. *Gregory* (6), where a person taking from his debtor a promissory note held by the debtor upon a trust, was compelled to restore it, and, having taken it with knowledge of the trust was declared to stand in all respects in the situation of the fraudulent trustee, the relief against the receiver being founded upon the fraud committed; and there, too, delay was held not to affect the case, the delay having been occasioned by the ignorance of the party entitled as to the rights she possessed.

Mr. *Campion* replied.

1873
August 4.

LORD CHELMSFORD:—

My Lords, in considering the question upon this appeal from the decree of the Vice-Chancellor of *Ireland*, declaring the sale of

(1) 10 Ves. 423.
(2) 11 Cl. & F. 714.
(3) 4 L. J. (N.S.) Ch. 214.
(4) 11 Cl. & F. 739–740.
(5) 5 H. L. C. 627.
(6) 13 W. R. 355; 4 De G. J. & S. 576.

1873
BROWNE
v.
MCCLINTOCK.

Mary McClintock's one-fourth share of the lands devised to her by the will of her father *Cornelius Helden* to be fraudulent and void, it will be necessary only to advert to a few of the leading facts.

The sale took place under a decree of the Court of Chancery, for the purpose of paying one-fourth of a legacy of £1000 bequeathed to *Mary McClintock* by a codicil to her father's will, and charged upon all the lands devised by the will. The whole of this legacy was ultimately assigned to *John Browne,* who instituted the proceedings upon which the decree for sale was founded. Upon the sale before the Master on the 20th of June, 1846, *Daniel O'Rorke,* a solicitor, and clerk to Mr. *Humfrey,* purchased *Mary McClintock's* share (as stated) in trust for *John Unsworth,* the brother-in-law of *John Browne,* for £1450. Upon this sale an order was made on the 2nd of July, 1846, to lodge the sum of £362 10*s.*, being one-fourth of the purchase-money of the share in question. On the 11th of May, 1847, by consent of *Browne,* the Plaintiff in the suit, and of all the Defendants, including *Mary McClintock, John Unsworth's* promissory note for £1087 10*s.* payable with interest at 5 per cent., being three-fourths of the purchase-money of *Mary McClintock's* share, was lodged in the *Bank of Ireland,* and *Browne* consented "to accept and take the note in payment of the sum decreed to him, and the costs of these causes incurred, and to be hereafter incurred, in respect of the said *Mary McClintock's* one-fourth part of the said lands and premises." And it was "farther consented and agreed that *Mary McClintock* should be at liberty to apply for and receive the sum of £362, now standing in the Accountant-General's book to the credit of these causes, being the one-fourth of the purchase-money of her undivided fourth part of the lands and premises, she, *Mary McClintock,* undertaking on receiving the said one-fourth to execute the deed of conveyance of the one-fourth of the said lands to the purchaser,"—that is to *Unsworth*—"and to do all other acts and deeds necessary to make title thereto, but at the costs and charges of the Plaintiff *John Browne.*"

This share of *Mary McClintock* was conveyed to *John Unsworth* by indenture dated the 27th of September, 1847, and on the 2nd of February, 1848, this share was conveyed by *Unsworth* to *John*

1873
BROWNE
v.
MCCLINTOCK.

Browne for a nominal consideration, and without any covenants in the deed, such as are usually inserted in a deed of that sort.

Cornelius Helden devised his lands to his wife *Martha Helden*, and to his three daughters, *Mary*, afterwards Mrs. *McClintock*, *Sarah*, afterwards Mrs. *Coote*, and *Sophia*, afterwards Mrs. *Lees*. *Mary McClintock*, by a settlement of the 14th of July, 1804, charged her one-fourth with an annuity of £400 to her mother, *Martha Helden*. This annuity of £400 was assigned to *John Browne* to secure £315 and interest, and farther advances. The £400 annuity so mortgaged fell into arrear, and *Browne* filed his bill against *W. F. McClintock* and others, praying that a sale should be decreed of two-fourths of the lands, that is to say, the one-fourth belonging to *Martha Helden* and the one-fourth belonging to *Mary McClintock*. This suit is called the annuity suit, to distinguish it from another suit with regard to *Mary McClintock's* share, which is called the legacy suit.

A decree for the sale of *Martha Helden's* share was made, and the sale took place on the 18th of April, 1846. At the sale Mr. *Humfrey*, the solicitor, attended, under the authority as alleged of a letter of the 15th of April, 1846, and was declared the purchaser of this share of *Martha Helden*, in trust for *Unsworth*. It is very important to consider this transaction with regard to the sale of *Martha Helden's* share, because it was conveyed by *Unsworth* to *Browne* by the same deed, of the 2nd of February, 1848, by which *Mary McClintock's* share was conveyed, and for the same nominal consideration, and of course without any covenants.

Two cause petitions were filed on the 7th of March, 1867, one to set aside the sale of *Martha Helden's* one-fourth share, and the other to set aside the sale of *Mary McClintock's* one-fourth share, both on the same ground, namely, that the purchases, though nominally in trust for *Unsworth*, were made in his name for his brother-in-law *John Browne*, the Plaintiff and the solicitor in the causes, and that he had concealed from the Court the fact of the purchases being for him. The Lord Chancellor after six days' hearing directed certain issues to be tried in both causes, but ordered that one of the causes only should be tried, and that the other should abide the event of that trial. Now the 6th, 7th, 8th and 9th issues which were directed with regard to this share of

1873
BROWNE
v.
MCCLINTOCK.

Mary McClintock, the 9th referring to all the purchases, were these:—The 6th issue was, "whether *John Unsworth* on the 20th of June, 1846, purchased on his own behalf, and for his own benefit, and not in trust for any other person or purpose, the one-fourth of the lands and premises in the pleadings mentioned, being the share thereof of *Mary McClintock*." The 7th issue was, "whether *John Unsworth* gave any and what authority to *Benjamin Humfrey*, previous to the 20th of June, 1846, to purchase on his own behalf the one-fourth share of the said lands and premises in the pleadings mentioned, being the share thereof of *Mary McClintock*, and when, and how, and in what manner was such authority given?" The 8th issue was as to whether *Unsworth* lodged in the Court of Chancery the sum of £362 10*s*., as the one-fourth of the purchase-money of *Mary McClintock's* share, and whether the said sum, and every part thereof, was the proper money of *John Unsworth*. And then there was an issue directed generally to all the purchases, "whether or not the said *John Browne* made or caused to be made all or any of the said purchases in the name of the said *John Unsworth*, but in fact and in truth on his own behalf and for his own benefit."

Now the jury found on the 6th issue, "That *John Unsworth* did not, on the 20th of June, 1846, purchase on his own behalf, and for his own benefit, and not in trust for any other person or purpose, the one-fourth of the lands and premises in the pleadings mentioned, being the share thereof of *Mary McClintock*." On the 7th issue it was found "That *John Unsworth* gave no authority to *Benjamin Humfrey* previous to the 20th of June, 1846, to purchase on his behalf the one-fourth share of the lands and premises in the pleadings mentioned, being the share thereof of *Mary McClintock*." On the 8th issue the finding was "That *Unsworth* did not lodge the sum of £362 10*s*. as the one-fourth of the purchase-money of *Mary McClintock's* share." And on the 9th issue, "That *John Browne* made or caused to be made all the said purchases, except the first, being *Martha Helden's* share, in the name of the said *John Unsworth*, but in fact and in truth on his own behalf, and for his own benefit."

A motion was made for a new trial of these particular issues which I have mentioned, but the Lord Chancellor refused a new

trial. The case came on upon farther directions before the Vice-Chancellor, and the Vice-Chancellor made the decree which is now appealed from.

The matters raised by the appeal are these: First, that the Lord Chancellor ought not to have directed issues; secondly, that the issues so directed are erroneous in point of form; thirdly, that there was not sufficient evidence to support the verdict, and that fresh evidence was discovered after the trial, upon which the Lord Chancellor ought to have granted a new trial; and, fourthly, that the delay in questioning the sale of *Mary McClintock's* share was a bar to the equity of the Petitioners.

Upon the first question, whether the Lord Chancellor ought to have directed the issues, I doubted at first whether after the issues had been tried, and the application for a new trial refused, it was open to the Appellants to object to the issues having been directed; but Mr. *Fry* satisfied me by referring to authorities, and particularly to the case of *Butlin* v. *Masters* (1), that this might be done. Upon this question the Appellants cited the case of *Nicol* v. *Vaughan* (2), in which it was said that issues are not to be directed on mere suggestions or suspicions, but that there must be some facts alleged to raise a reasonable doubt upon some material question in the case. Now the circumstances brought before the Court in the present case were such as seemed to me to have been deserving of farther inquiry, in order to ascertain whether the purchase of *Mary McClintock's* share, though made in *Unsworth's* name, was not actually a purchase in trust for *Browne*. I am disposed to lay but little, if any, stress on the transaction as to the sale of the leasehold lands at *Ballylough*, of which the purchase was said to have been made by *Humfrey* for *Unsworth*, but really for *Browne*. No authority was shewn either for the sale or for the abandonment of the sale, and the assumption of *Browne* being the purchaser of those leasehold lands is merely suspicion, without any proof.

With respect to the purchase of *Mary McClintock's* share, no authority was shewn from *Unsworth* to *Humfrey* to bid at the sale. This is the more to be remarked, as there was an authority pro-

(1) 2 Phil. 290.

(2) 5 Bli. (N.S.) 505; 2 Dow. & Cl. 420. See also 1 Cl. & F. 495.

1873
BROWNE v. McCLINTOCK.

duced from *Unsworth* to *Humfrey* to bid for *Martha Helden's* share. In reference to this authority, it is not unimportant to observe the terms of it, as that share, together with *Mary McClintock's* share, was, as I have already said, conveyed by the same deed on the 2nd of February, 1848, to *Browne*, for a nominal consideration. This authority was, I think, fairly described as having been prepared by a lawyer. It is headed in the annuity suits, "*John Browne* v. *William McClintock* and others, *Same* v. *Same*," and is in these terms, being of the date of the 15th of April, 1846:

"Sir,—I hereby authorize you to bid for me for the lands of *Augherlough*, and the other lands in the county *Leitrim*, advertised to be sold under the decree in these causes, on the 18th instant, in Master *Goold's* office.

"Your obedient,

"*John Unsworth.*"

"To *Benjamin Humfrey*, Esquire."

Now there can be no doubt whatever that this was an authority, not for the purchase of all the lands, or any lands which might be sold under the power which *Browne* possessed over them, but for the purchase, at that particular sale, which was to take place on the 18th instant, of *Martha Helden's* share which was advertised for sale on that day.

With regard to *Mary McClintock's* share, *Humfrey* in the suit proposes to prove that he received an authority to purchase from *Unsworth*, and he says in his affidavit, "That in or about the year 1846 I received a letter of authority from Mr. *John Unsworth*, through Mr. *John Browne*, since deceased, instructing me to attend at a sale which was then about to be held of property in the county of *Leitrim*, in the pleadings in this suit mentioned, and to bid for and purchase same on his behalf." "That I preserved the said letter of the said *John Unsworth* for a great many years, and had same in my possession up to a very recent period, when, as I best recollect, I destroyed same as useless, or placed it with some unimportant papers, amongst which I have made search for same without effect."

It is rather extraordinary that he should have destroyed this letter, and that he should have preserved during the whole

of the time this authority of the 15th of April, 1846, for the purchase of *Martha Helden's* share, which was equally useless with the other letter which he destroyed. It certainly seems to me that no satisfactory proof of any authority ever having been given for the purchase of *Mary McClintock's* share appeared before the Lord Chancellor when he directed these issues to be tried.

The explanation of the mode in which *Browne* acquired the property from *Unsworth* is not, to my mind, very satisfactory. *Unsworth* says, "That not very long after said sale I received a peremptory letter, making a claim on me in respect of said estate, for some charge thereon from Government, as I best recollect; and not knowing what other charges might be made upon me, or to what amount I might become liable, I became dissatisfied and alarmed, and applied to the said *John Browne* to take the estate off my hands, as I wished to be rid of it, and in consequence, as he was the means of my buying it, he agreed to take it off my hands, and that I should hold it as a trustee for him from that time, pursuant to which arrangement the said *John Browne* subsequently returned me the amount of my deposit, and I executed a deed conveying said property to him, when required by him so to do." Now no date is assigned by *Unsworth* to the time when he was alarmed by this Government notice, and when he was induced therefore to desire *Browne* to take the property off his hands, nor was any evidence of this supposed notice produced.

But, in the meantime, transactions took place which were quite inconsistent with the alleged state of things. On the 11th of June, 1847, *Browne* consented to accept *Unsworth's* promissory note for payment of the sum decreed to him in the legacy suit. The conveyance from *Unsworth* to *Browne* having been executed on the 2nd of February, 1848, on the 4th of February, 1848, *Browne* obtained a power of attorney from *Unsworth* to receive £337 10*s.*, lodged in respect of *Martha Helden's* share, and on the 28th of April, 1848, *Browne* applied for an injunction to put *Unsworth* in possession of *Martha Helden's* share, and also a similar injunction as to *Mary McClintock's* share. This is said to have been upon the motion of Mr. *Barker*, solicitor for *John Unsworth*, to whom *Barker* never was solicitor, but he appears by an affidavit of *Browne* to have been employed by him as solicitor for himself,

1873
BROWNE
v.
MCCLINTOCK.

and for *Unsworth*. What other object can possibly be conceived for all these proceedings than to hide the fact of *Browne* being the real purchaser of these properties?

In addition to all this, the Lord Chancellor had before him, when he directed the issues, what are called the angry proceedings with regard to *Sarah Coote's* share. It is unnecessary to go into them; but it was expressly alleged that her share, and *Mary McClintock's* share, which were sold at the same time, though knocked down to *O'Rorke* as trustee for *Unsworth*, yet in point of fact were purchased for *John Browne*, the solicitor, and the Plaintiff in person. *Browne*, by his affidavit in that petition, admitted that *John Unsworth*, by a subsequent arrangement with him, became a trustee for the deponent on his purchase, and upon the Order for the taxation of costs, it was ordered that it should be without prejudice to any question before the Taxing Master as to *Unsworth* being a trustee for *Browne*. Neither *Unsworth* nor *Browne* upon this occasion condescended to state when and how the arrangement took place by which *Unsworth* agreed to become a trustee for *Browne*, and whether it was verbal or in writing.

Was there not in these unexplained circumstances a reasonably doubtful question to be tried? The very fact of the conveyance of the two shares of *Martha Helden* and *Mary McClintock*, for a nominal consideration and without any covenants, coupled with the other facts connected with the purchases, was quite sufficient to justify a conclusion that *Browne* was originally the real purchaser, and to make it desirable that a farther inquiry should take place, in which *Humfrey* and *Unsworth* should be examined before a jury. I think that the Lord Chancellor did quite right in directing issues, and that it was no objection to his doing so that the Petitioners had not taken advantage of the liberty which was given them to cross-examine upon the affidavits.

The next objection made by the Appellants is, that the issues are so framed as to cast on them the onus of negativing the alleged fraud. This is undoubtedly true as to all the issues, except the ninth. I am not prepared to say that it was wrong in this instance to throw this onus upon the Appellants. Mr. *Browne* stood in such a relation to the cause in which the sale was decreed, that

he could only have bid for the property by leave of the Court. He was Plaintiff in the suit, and solicitor; and if the biddings, though nominally in trust for *Unsworth*, were really on behalf of *Browne*, there was a fraud committed upon the Court. It was to try this very matter that the issues were directed. The Lord Chancellor had the affidavits of *Unsworth* and *Humfrey* before him, and knew that they would be able to prove whether or not the purchases were made on behalf of *Unsworth* and for his own benefit. Therefore, as it appears to me, he not improperly framed the issues so as to throw upon the Appellants the burden of proving the affirmative of those issues. I do not see why the ninth issue should not have been framed in the same manner.

The next objection of the Appellants is that the verdict is contrary to the evidence, and that the Lord Chancellor ought therefore to have granted a new trial, or at all events should have done so upon the ground of the discovery of fresh evidence after the trial. It is not denied that there was evidence before the jury on both sides, but it is contended that the weight of evidence was greatly on the side of the Appellants. It was observed upon the argument on this question, that in Courts of Law, upon an application for a new trial, if there has been evidence upon which the jurors might fairly have arrived at the conclusion at which they did arrive, although there may be a great preponderance on the other side, the Judges refuse to disturb the verdict, frequently observing that if it had been left to them, they would probably have found differently. To this it was said (and perhaps justly) that the Judge in Equity directing issues possesses a larger discretion in determining whether the finding of the jury is satisfactory to his mind or not. And in an appeal against the exercise of this discretion a Court of Appeal would be slow to interfere, unless it felt satisfied that there was nothing in the evidence upon which the opinion of the Judge could properly have been founded.

It is impossible to say that that was so in the present case. All the facts and circumstances which were before the Court when the issues were directed were presented to the jurymen, who had in addition the *vivâ voce* evidence of *Unsworth* and of *Humfrey*. The questions which they were called upon to decide were, whether

1873
BROWNE
v.
McCLINTOCK.

upon the different sales *Unsworth* purchased on his own behalf and for his own benefit, and not in trust for any other person. It appeared clearly that all the instructions which *Humfrey* received were from *Browne*. Upon this the transaction as to the lands of *Ballylough* is important, though not to shew that they were purchased for *Browne*. As to this, *Humfrey* says that he had an interview with *Browne* previous to the sale in 1845, when he called upon him and instructed him to go down and bid for his brother-in-law, Mr. *Unsworth*. He says that he did not communicate the fact of the purchase to Mr. *Unsworth*, and never received any instructions from *Unsworth* afterwards in reference to that property. He says that that was the first and the last transaction which he had with *Browne*. But then he had before said that he had another interview with *Browne*, when *Browne* handed him the letter of the 15th of April, 1846, being the authority to bid for *Martha Helden's* share. It appears that he only knew of the existence of *Unsworth* by reputation; for he is asked upon the trial, "Did you know the man existed?" He says, "Only by reputation." "How did you know anything about him?" "I knew Miss *Browne* was Mrs. *Unsworth*, and I knew she had a brother in *Liverpool*, and I accordingly bid for him; and the reason I did so was because I thought Mr. *Browne* was not in a position to purchase. That is the reason I believed I was bidding *bonâ fide* for Mr. *Unsworth*. That is all I can say on it—it was my opinion at the time, and it is my opinion still."

With respect to the letter of the 15th of April, 1846, in *Humfrey's* affidavit, it would appear as if, besides this letter produced, there had been a distinct authority to him to bid for *Unsworth* upon the sale of *Mary McClintock's* share and *Sarah Coote's* share. He states that about the year 1846 he received a letter of authority from *Unsworth*, through *Browne*, instructing him to attend the sale; and he says that he preserved (as I have already stated) that letter for a certain time, but that recently he had destroyed it as being useless. Of course the letter which he says he destroyed as useless must have been some other authority than the letter of the 15th of April, 1846, which was produced. But he says of that letter of the 15th of April, 1846, that he considered and acted on it as an authority for all the lands. Now this it

clearly was not; for it was to bid for lands "advertised to be sold on the 18th instant," being *Martha Helden's* share only.

Any one judging upon these facts might fairly and justly arrive at the conclusion that there never was any authority given from *Unsworth* to *Humfrey* to purchase *Mary McClintock's* share; but, as he says, *Browne* came to him again when this sale came on, and no doubt his instructions were from *Browne*.

The reason stated by *Unsworth* at the trial for giving up the purchase was, that he received a parliamentary document half printed, making a claim for £50, which he would not swear was for drainage, but said was for something like it. This was to a certain extent contradicted by evidence which was objected to, but which was clearly admissible, of a public book of the Board of Works, shewing that there was no entry of such a demand for drainage. And when, in addition to all this, the conveyance from *Unsworth* to *Browne* was proved, and *Unsworth* even after this was put forward as the ostensible owner by *Browne* himself, concealing thereby that he was the real owner, there seem to me to be ample grounds to warrant the jury in finding that *Unsworth* did not purchase the share in question on his own behalf and for his own benefit, and to justify the Lord Chancellor's satisfaction with the verdict and his refusal to grant a new trial.

The Appellants, however, contend that a new trial ought to have been granted upon the ground of a letter *noviter repertum*. This letter is sworn to have been discovered after the trial of the issues, in a drawer of an old office desk, which had been locked for many years, and the key lost. Why at this critical time a country smith should have been employed to open the drawer, which was supposed to contain nothing, is not explained. The observation is not unimportant, as it was held in *Dixon* v. *Graham* (1) that a paper which with due diligence might have been found at first is not in legal meaning *noviter repertum*. But waiving this consideration, let us examine the letter itself, and judge of its importance. That letter is in these terms:—"*Liverpool*, 15th December, 1845. My dear *Browne*,—I now return you the receipts, and it would be as well if the affair was closed in any way you choose." Of course it is not explained what that affair

(1) 5 Dow. 266.

1873

BROWNE v. McCLINTOCK.

is. The part of the letter which refers to this matter is,—"I also note your remarks about the *Leitrim* estate, of which please keep me advised." That letter is signed "*John Unsworth.*"

It is said by the Appellants that there is an undesigned coincidence here, because in the affidavit of Mr. *Unsworth* he states that when he was in *Ireland* in 1845, he asked *Browne* whether he had any estate at the time for sale through his office, and he, *Unsworth,* said that he should be willing to purchase property in the county of *Leitrim.* The words of the letter are,—"I also note your remarks about the *Leitrim* estates, of which please keep me advised." That is a nice and critical remark, but I do not think that it is entitled to much weight. In the year 1845 it may have been *Unsworth's* intention to purchase, which was afterwards carried out by the purchase of *Martha Helden's* share, which the Respondents (the Petitioners in the suit) are now concluded from saying was not bought by *Unsworth.* But the jury having found that *Unsworth* gave no authority to *Humfrey* previous to the 20th of June, 1846, to purchase *Mary McClintock's* one-fourth share, how this letter of the 15th of December, 1845, to *Browne,* adverting to some unexplained remarks about the *Leitrim* estate, can have any important bearing upon the issue, I am at a loss to understand. Of this I am convinced, that if it had been forthcoming at the trial it would not have led and ought not to have led, to any different result.

The verdict of the jury therefore remaining undisturbed, the Vice-Chancellor upon the case coming before him on farther directions, decreed that the sale of *Mary McClintock's* share was fraudulent and void. But the Appellants contend that, assuming that the sale might originally have been set aside, the claim to impeach it is barred by laches and acquiescence. They say that the sale was ratified on the 11th of June, 1847, when *Mary McClintock* consented to receive the £362 10s., being one-fourth of the purchase money of her share, which had been lodged to the credit of the legacy suits, she undertaking to execute a conveyance to *Unsworth* of such share. This conveyance was afterwards executed on the 27th of September, 1847. The cause petition was filed on the 7th of March, 1867, just within twenty years from the time of the above consent of *Mary McClintock,* and upon this

lapse of time the Appellants rely not merely as acquiescence, but as an actual compromise of her claims.

It was said that the Court of Chancery will refuse relief in cases where there has been great delay in asserting a claim to avoid a purchase, although the delay has been for a less time than twenty years, and cases were cited to this effect; but these were all cases in which the dealings with the property were open and known. The case of *Champion* v. *Rigby* (1) was the case of a purchase by a solicitor from his client. *Sibbering* v. *Earl of Balcarras* (2) and *Roberts* v. *Tunstall* (3) were purchases of reversions. There was no underhand dealing or concealment in these cases, all was open and notorious, and known from the very beginning. Here, on the other hand, *Mary McClintock*, at the time of the transaction which is pressed against her, was not aware that *Browne* was the person who purchased at the sale in the name of *Unsworth*, the ground upon which the sale could be impeached. This fact was studiously concealed, and therefore delay is not imputable to *Mary McClintock* till she knew, or had the means of knowledge, that *Browne*, and not *Unsworth*, was really the purchaser of her share. She was represented upon the occasion of this alleged compromise by Mr. *Booth*, as her solicitor, and of course any knowledge which he possessed is imputable to her. But there is no reason to think that he was not kept in ignorance of the material fact of *Browne* being the real purchaser. The deception of putting *Unsworth* forward and keeping *Browne* in the background was continued throughout; and there is nothing in these proceedings, from first to last, to indicate, or even to raise a suspicion, that *Unsworth* was a secret trustee for *Browne*.

I asked, in the course of the argument upon the point of delay, whether, if *Mary McClintock* was in ignorance of the relation in which *Browne* stood to the purchase, when she received the £362 10*s*. and agreed to execute a conveyance to *Unsworth*, any other time could be pointed out when it could be said that she must have acquired this knowledge. It was admitted that no such time could be fixed upon. Indeed, from the period of this transaction, *Mary McClintock* ceased to have any concern in the proceed-

(1) 1 Russ. & My. 539. (2) 3 De G. & Sm. 735.
(3) 4 Hare, 257.

1873
BROWNE
v.
McCLINTOCK.

ings in the suit. If she had followed them at all she would have found *Unsworth* still assuming the character of purchaser, and, with *Browne's* connivance, being put into possession of her share. This occurred after the conveyance of the 2nd of February, 1848, from *Unsworth* to *Browne;* and if at any time *Mary McClintock* knew that *Browne* had become the owner of her share, there was nothing to rouse her suspicion from this circumstance, as she might well believe that he had purchased *Unsworth's* interest in it. I think that neither laches nor acquiescence can properly be imputable in this case, and that the Vice-Chancellor was perfectly right in coming to that conclusion.

I therefore submit to your Lordships that the decree in this case ought to be affirmed, with the exception of its being varied by inserting certain words in it.

LORD COLONSAY and LORD HATHERLEY went fully through the evidence, and expressed their complete concurrence with the opinion of Lord *Chelmsford.*

The following Order was entered on the Journals:—

It directed that the Orders of the Court of Chancery in *Ireland,* of the 12th of August, and 9th of April, 1868, and the 30th of April, 1870, should be affirmed; that certain verbal alterations (therein set forth) should be made in the Order of the 20th of July, 1870, which it ordered to be varied by inserting the following words:—"And if it is found, on taking the said account, that anything is due from the said Petitioners, it is ordered that the said Petitioners pay such sum to the Respondent *Mary Browne* as executrix as aforesaid," and by also inserting the following words:—"And let what, upon taking the said account, shall be certified to be due from either of the parties to the other of them be (within one month after the date of the confirmation of the Master's report) paid by the party from whom to the party to whom the same shall be certified or reported to be due;" and that with these variations, the said Order of the 20th of July, 1870, be and the same is hereby also

affirmed, and that the said Petition and appeal be and the same is hereby dismissed this House: And that the Appellants do pay or cause to be paid to the said Respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the Clerk of the Parliaments: And that the cause be and is hereby remitted back to the Court of Chancery in *Ireland*, to do therein as shall be just and consistent with these variations and this judgment.

Lords' Journals, 4th August, 1873.

Solicitors for the Appellants: *Stephens & Langdale.*
Solicitors for the Respondents: *J. & R. Gole.*

END OF VOL. VI.

INDEX.

ABANDONMENT: *See* INSURANCE.

ACQUIESCENCE: *See* WARREN.

Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed. EARL BEAUCHAMP *v.* WINN - - - - - - 223

ADDED PROPERTY: *See* WILL. 2.

AGREEMENT: *See* DELAY; SPECIFIC PERFORMANCE; WARREN.

1. Where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief.—The Court of Equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition.—What is the nature of a mistake and what has been the cause of it will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief. EARL BEAUCHAMP *v.* WINN - - - - 223

2. —— Where the subject of the contract was an agreement to take the lease of a house, and the proposed tenant went into possession at once, and occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, and paid rent, but always paid it under protest:—*Held*, that these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use and occupation, and in no other character.—*A.* was the owner of some land, on which he was about to erect buildings. *B.* wished to have cellars there for wine vaults. *A.* promised that they should be made dry, but would not introduce that promise into the written agreement. *B.*, however, confiding in the promise, signed the agreement, by which he undertook to

AGREEMENT—*continued.*

accept from *A.* a lease of the vaults for a certain term and at a certain rent. *B.* was to pay down £100, and was to pay another £100 on the execution of the lease. *B.* paid the first £100, and, for his own convenience, before the day fixed, took possession of the vaults, and placed therein a large quantity of wine, but soon complained that the vaults had not been made dry. These complaints he constantly renewed, and every time he paid the rent paid it under protest; and, finally, after more than two years' actual occupation of the cellars, refused to sign the lease on the ground that the cellars had not been made fit for his occupation, and he did not pay the second sum of £100, but removed his stock of wines to another place. On a bill for specific performance, the Court below granted a decree against *B.*, but accompanied it with a direction that there should be an inquiry whether a certain thing suggested by *B.* in the course of the long correspondence between the parties, but neglected by *A.*, should not be done:—*Held*, that the taking possession of the vaults and the payment of the rent, which payment must be attributed to the actual use and occupation of the premises, did not prevent *B.* from setting up as a defence the non-performance of the promise which had been the inducement to the contract.—*Per* Lord *Cairns*:—The law implies that a person who takes possession of premises before the agreed works to render them fit for occupation are at an end, does so without prejudice to his rights under the agreement. LAMARE *v.* DIXON - - - 414

APPROPRIATION, SPECIFIC: *See* BILL OF EXCHANGE.

AREA: *See* RAILWAY.

ASSIGNEE OF FREIGHT: *See* BILL OF LADING.

ASSIGNMENT, EQUITABLE: *See* BILL OF EXCHANGE.

BILL OF EXCHANGE.] A representation, by the drawer, that bills of exchange drawn upon *L.* will assuredly be paid, for that the drawer has previously remitted to *L.* funds to a much larger amount, in consequence of which representation *B.* purchases those bills from the drawer, does not amount to an equitable assignment by the drawer of the funds in the hands of *L.*, nor to a specific appropriation, out of those funds, of the amount of each of those bills.—Where, therefore, such an assurance had been given, and the funds

BILL OF EXCHANGE—*continued.*

in the hands of *L.* were larger than the amounts of the bills drawn upon him, but a bankruptcy of the drawer took place before the bills were payable, *L.* was held to be justified in refusing to pay the particular bills, and in handing over the funds to the legally appointed receiver of the bankrupt's estate, who demanded them on behalf of the general creditors of the drawer.—*L.* was a banker in *England*, and had dealings with *N. O.*, a banker and bill dealer in *America*. The course of business was that *N. O.* remitted funds to *L.*, and then drew bills on *L.*, and sold those bills in *America* to persons who wished, in that way, to make payments in *England*. *N. O.* had represented to intending purchasers of these bills that they would certainly be paid, for that "the bills were drawn expressly [or "specially"] against funds to a much larger amount already remitted to *L.*;" and on the faith of this assurance they were purchased:—*Held*, that this did not amount to a contract entitling the purchaser of any one of the bills to a specific portion of the funds in the hands of *L.*—The application of the rule in *Jorden* v. *Money* (5 H. L. C. 185) as to the distinction between representations of intention and of fact, approved. CITIZENS' BANK OF LOUISIANA *v.* BANK OF NEW ORLEANS - - - - 352

BILL OF LADING.] A bill of lading, in mentioning the freight payable for a cargo, did not use the ordinary words "he or they paying freight for the same," but, after giving the names of the consignees to whose order the cargo was to be delivered, employed the words "freight for the said goods £4 5*s.* per ton of 20 cwt. net, delivered, with primage and average accustomed," &c.:—*Held*, that the two forms of expression were in effect the same, and constituted the ordinary condition that the goods were to be deliverable only on paying freight.—Though freight may not be payable in respect of a man's own goods conveyed in his own ship, it becomes so if he makes third persons, who have advanced him money, the consignees of those goods, and the goods are by the bill of lading deliverable to their order.—*T. & Co.*, who acted as the *London* bankers for *Holm*, of *Stockholm*, consented to open a credit in his favour with merchants at *Akyab* for the purchase of "rice for the English market shipped by vessels of my own, the *Java*, &c., at, &c., *f. o. b.*" The rice was purchased, and shipped on board the *Java*, and made deliverable to the order of *T. & Co.*, who accepted bills to cover the purchase. The bill of lading was indorsed to them; it described the goods "to be delivered in like good order, &c., unto *T. & Co.*, or their assigns; freight for the said goods £4 5*s.* per ton of 20 cwt. net, delivered, with primage and average accustomed." While the *Java* was on its voyage, *Holm* obtained advances from *C. & Co.*, to whom he assigned the freight as security:—*Held*, that under these circumstances *C. & Co.* were entitled to the freight, and that *T. & Co.* were, like all other consignees of a cargo, liable to pay it under the terms of the bill of lading, although the cargo was, in fact, brought to *England* in *Holm's* own vessel the *Java*.—The holders of a bill of lading cannot, as against the assignees of the freight, set off a debt due to them from the original owner of the goods, who was also the assignor of the freight. WEGUELIN *v.* CELLIER - - - - 286

BILL OF LADING—*continued.*

BOROUGH: *See* MARKET.

BORROWING POWERS: *See* MARKET.

BUTE DOCKS: *See* COMPANY. 2.

CAMBRIDGE: *See* MARKET.

CHARITY: *See* WILL. 1.

Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more.—In 1558 a testator gave certain houses in *Old Change* to his son and the son's heirs, but, if the son died without issue, to the *Wax Chandlers* of the City of *London*, "for this intent and purpose and upon this condition," that they should distribute annually £8 in the manner therein described, viz., £3 18*s.* to the poor of *St. Mary Magdalen*, and 2*s.* to the churchwardens for their painstaking; 38*s.* to the poor of the parish of *Bexley*, in *Kent*, and 2*s.* to the churchwardens of that parish for their pains; 35*s.* to the poorest men and women of the *Company of Wax Chandlers*, and the other 5*s.* to the Master and Wardens of the Company, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparation of the said houses and tenements." If the Master and Wardens should leave any of these things undone, the property was to go over to the testator's next of kin, "upon condition that they should do all these things." The son died unmarried, and the *Wax Chandlers* entered into possession, kept the premises in repair, and, after the great fire of *London*, rebuilt them. The rents had largely increased:—*Held*, that the will created a trust; that all the income was exhausted by the appropriations of it directed by the will, and that consequently the whole was properly applicable to purposes of charity.—The *Wax Chandlers* had in 1790 purchased a small piece of property adjoining the devised land, and had built upon it, so that the original and the purchased property were now conjoined and formed one whole. There was no distinct proof as to the funds out of which this added property had been purchased. In the absence of such proof, it was *held*, that the added property must be treated as belonging to the *Wax Chandlers*; and it was declared that it did belong to them, and an order was made for an inquiry to distinguish the two properties, and for the application of the rents and profits thereof.—To declare under such circumstances as existed here that this added property was to be applied to the purposes of the charity would be like following and taking possession of the back rents *bonâ fide* received by the company: a course which the practice of the Court did not sanction.—"Reparation" of premises, used in a gift of those premises to a charity, must be held to comprehend their restoration in the event of any catastrophe befalling them. THE ATTORNEY-GENERAL *v.* WAX CHANDLERS' COMPANY - - - - 1

CHILDREN: *See* WILL. 3.

CHURCH BUILDING ACT.] By the *Church Building Act*, 5 Geo. 4, c. 103, persons subscribing (under that Act) more than £50 towards building a church might elect three life trustees who for forty years might nominate a clerk to serve the same. When any of the trustees died, the majority of the subscribers at a meeting to be called for that purpose might (s. 7) elect a life trustee in his place; and (s. 8) if the subscribers should not exceed three they were to be the life trustees. If all the trustees should die (s. 12) so that no election could take place, the incumbent of the parish was to present. A church was built by subscriptions, raised in accordance with the Act, trustees were appointed, and all died but one. There was also a surviving subscriber who had not been a trustee. He did not then know that there was a surviving trustee, and called in due form a meeting of subscribers. The surviving trustee did not attend it; the subscriber did, and elected himself. He pursued the same course after becoming aware of the death of the last trustee. After each election of himself as trustee he nominated a clerk:—*Held*, that he had not under the statute any title to make such nomination, which therefore conferred no title to admission. Allen *v.* The Bishop of Gloucester [219

COMMISSION: *See* Company; 3, 5; Director.

COMPANY.] A joint stock company was registered under the 7 & 8 Vict. c. 110. Certain clauses in its Deed of Settlement required that a holder of shares desirous of transferring them must give notice thereof to the officer of the company; that the directors at a board meeting must certify their approval of the proposed transferee; that the transferor must execute a deed of transfer; and that every transferee, approved of by the directors, must, within one calendar month execute, at the office of the company, or at such other place as the board should reasonably require, a deed of covenant to abide by the rules and regulations of the company, "whereupon such person shall become a shareholder of the company." *B.* held shares in the company, and was a director: he desired to transfer his shares; he gave no notice—no certificate of approval was given before the transfer (it was alleged that such certificate was given after the transfer); a deed of transfer was executed, but no deed of covenant as required by the articles of association was ever executed:—*Held* (*diss.* Lord *Chelmsford* and Lord *Colonsay*), that the transfer thus made, though irregularly, was not invalidly made, and the persons then known as directors having at a meeting of shareholders recognised the transferees as shareholders, and having then and there declared them to be elected as directors, and the shareholders at such meeting having accepted them as directors, the validity of the transfer to them and their title to office could not afterwards be impeached:—*Per* Lord *Cairns*:—The clauses in the deed are affirmative clauses—the objection as to the non-execution, by the transferee, of the deed of covenant is cured by the 30th section of the 7 & 8 Vict. c. 110. The moment the transferee assumed to act as a director, and allowed himself to be returned as a shareholder, he lost all right to question his liability.—*Per* Lord *Chelmsford*:—A transferee of shares may be

COMPANY—*continued.*

estopped from disputing his liability as a shareholder, and yet his ownership of the shares may not qualify him for holding office in the company. The 30th section of 7 & 8 Vict. c. 110, does not apply to this case.—*Held*, also (*diss.* Lord *Chelmsford* and Lord *Colonsay*), that the transfer made under these circumstances was sufficient to relieve the transferor from liability to become a contributory:—The directors had no power to dispense with the execution, by the transferee, of the deed of covenant—the only discretion they possessed as to such deed related to the place of its execution.—By one clause of the deed of settlement it was provided that if losses should absorb not only the reserve fund, but also 80 per cent. of the capital subscribed for, "the company shall be *ipso facto* dissolved, and the directors shall within twenty days (and they are hereby required so to do) call a special general meeting of the shareholders, and lay a statement of the affairs of the company before such meeting." A report of an accountant specially employed by the directors shewed that such losses had occurred. No special meeting was called, nor at the next general meeting (which occurred shortly after the date of the report) was the report laid before the shareholders, but the business of the company was continued. At the general meeting of that year the report was not laid before the shareholders, but they were informed that the increased claims upon the company had so reduced the margin of profit that the directors could not recommend the payment of a dividend. At the next general meeting the shareholders were told that three new directors had been elected, but they were not told that three of the old directors had retired, and that their transferred shares constituted the qualification upon which the new directors had been elected:—*Held* (*diss.* Lord *Chelmsford* and Lord *Colonsay*), that these circumstances, though entirely irregular, did not invalidate the proceedings of the directors.—*Per* Lord *Cairns*:—The allegations of facts in this case were not those which should have formed the ground for a proceeding to settle contributories; if true they constituted a case for relief of a wholly different description. The case shewed the great advantage of the use of some form of pleading.—In the Court of the Master of the Rolls the transfer had been held to be invalid, and the transferor liable to be made a contributory. By Lord Chancellor *Hatherley* this decision had been reversed. In this House the judgment of the Lord Chancellor was sustained; but, on account of the differences of opinion, and the irregularities of the proceedings in the transfer (though no fraud was established), no costs were given. Murray *v.* Bush - - 37

2. —— If the directors of a railway company become, for the purpose of the company, lessees of land, with a privilege to use docks, and agree to pay rent and royalties to the owner of the docks, and enter into other conditions which, by a state of circumstances subsequently created, appear to be unreasonable and impolitic, such stipulations and conditions cannot on that account be treated as *ultrà vires* of the directors.—Nor can a condition to pay shipping dues, not only for goods actually brought along the railway and shipped

COMPANY—*continued.*

at those docks, but for goods brought along the railway to be shipped at other docks, be treated as a covenant in restraint of trade.—The directors of a railway company, *T.*, in order to obtain the use of the *B. Docks*, then existing and situate near the end of their line, wherein to ship and unship goods carried along their railway, entered, in 1849, into a contract with the owners of these docks to pay certain dock and lockage dues, and accepted (under the authority of a private Act of Parliament) a lease for 250 years, by which they bound themselves to procure, as far as they could, all goods sent along their railway to or from ships, to be shipped or unshipped at these docks, and to pay certain dues and royalties in respect of all goods, &c., shipped or unshipped there which had been or should be conveyed "along the railway or any part or branch thereof":—*Held*, that this only applied to the railway or those parts or branches of it which were in connection with some place of shipment or unshipment.—The *T.* directors by the same lease also covenanted that when and so often as goods, &c., conveyed along the *T. Railway*, or any part or branch thereof, should be shipped or unshipped in any dock other than the *B. Dock*, the *T.* directors and their successors should pay to the *B.* trustees the same dues, &c., in respect thereof, as would have been payable on such goods if shipped or unshipped in the *B. Dock*:—*Held*, that "shipped or unshipped in any other than the *B. Dock*" did not apply to goods carried along a part of the *T. Railway* and then along any other railway, and shipped at any dock whatever and wherever, but only to docks in connection with the *T. Railway* itself.—*Semble*, that any other construction of the covenant would make it both unreasonable and *ultrà vires*.—After this lease of 1849 had been made, certain private Acts of Parliament were passed which incorporated another body of persons as the *P. Company*, and authorized the construction by the *P. Company* of a line of railway and of docks; and also authorized the directors of the *P. Company* to grant, and the directors of the *T. Company* to accept, a lease of the new undertaking. The lease was duly executed under the powers of these Acts, and the *T.* directors thenceforth used the new line and the new docks, and discontinued the use of the *B. Docks*. In an action by the *B.* trustees upon the covenants in the lease of 1849:—*Held*, that those covenants were not thereby violated; that the *P. Railway and Docks* having been made under Acts of Parliament passed subsequent to the lease, the fact of the *T.* directors becoming the lessees or assignees of the *P.* undertaking did not constitute the *P.* line of railway a "part or a branch" of the *T. Railway*; and that consequently the *T.* directors were not, by the use of the *P. Railway and Docks*, liable to the *B.* trustees as for breach of the covenants in the lease of 1849.—This being a proceeding in Error under the *Common Law Procedure Act*, no direction was given as to costs. Taff Vale Railway Company *v.* Macnabb - 169

3. —— A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company.—So, if,

COMPANY—*continued.*

acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company.—Where the articles of a joint stock association declared that if a director had any interest in a contract proposed for acceptance by the association, he should declare his interest, or his place as director should be vacated, and that having declared it he should not vote on the proposal:—*Held*, first, that "declare his interest" meant declare the nature of his interest, and that the words were not satisfied by a mere declaration that he had an interest in the matter:—And, secondly, that the vacating of the seat would not prevent the contract itself from being treated as one made for the benefit of the association, for that the rule of equity would apply to such a case in addition to the penalty specially mentioned by the article of association.—In a joint stock association created for the purpose of carrying into effect loans and other financial operations, *C.* (who carried on business as a stockbroker) was a director. An article of the association required that if a director "contracts with the company, or is concerned in, or participates in the profits of any contract with the company, or participates in the profits of any work done for the company, without declaring his interest at the meeting of directors at which such contract is determined on, or work ordered," his office of director should be vacated. The article farther required that he should not vote on such contract or work. *C.* had entered into an arrangement with *P.* to "place" the debentures of a railway company for a commission of 5 per cent. *C.* at a meeting of the directors, without mentioning his arrangement with *P.*, but merely declaring that he had an interest in the transaction, proposed to the association that it should undertake to "place" these debentures at a commission of 1½ per cent. The proposal was adopted, and debentures to a very large amount were "placed" by the association:—*Held*, that *C.* was liable to account to the association for the difference between the two amounts of commission, so far as concerned the debentures which had been actually placed by the association.—The liability of the director had been declared by *Malins*, V.C., and the relief prayed for by the association had been granted with costs. His Honour's decree was, on appeal to the Lord Chancellor, reversed with costs. On appeal to this House, the order of the Lord Chancellor was reversed, but the original decree being varied in some of its details, no costs were given, but the case, with a declaration, was remitted to the Court of Chancery to do what should be just in accordance with the decision of this House.—*C.* had a partner, *K.*, who was not in any way connected with the association; the transaction, however, had been a partnership transaction:—*Held*, that the partners were liable, jointly and severally, to make good to the association the profits which it ought to have received in the increased amount of the commission. Imperial Mercantile Credit Association *v.* Coleman & Knight - 189

4. —— *M.* consented, at the request of the secretary of the *C. Company*, to become the purchaser of shares in the *W. Company*. The shares were purchased by him for the *C. Company*, from which he

COMPANY—*continued.*

received £15 for himself. He never paid anything for these shares, the money being paid by the *C. Company*, on whose behalf he had purchased them. *M.* executed transfers of the shares to the *C. Company* (at the written desire of the secretary of that company), and took no farther trouble in the matter. The *C. Company* was ordered to be wound up. The *W. Company* was wound up voluntarily, under the direction of the Court. There were pecuniary transactions between the two companies. The *W. Company* made a call on *M.* in respect of his shares. The shares were declared forfeited for non-payment of calls. *M.* afterwards explained all that had been done, and the *W.* directors, in consideration of his transferring to them all his rights and interests in the shares, released him from all liability to them. *M.* took out a summons for the purpose of compelling the *C. Company* to indemnify him against any demands that might be made on him by, or on account of, the *W. Company*:—*Held*, that this was a mere case of trustee and *cestui que trust*, and that *M.* was entitled to the indemnity.—Where a company is being voluntarily wound up under the authority of the Court, the liquidators cannot recognise the release of one of its contributories, declared by a deed of the directors, without first obtaining the sanction of the Court. James *v.* May - - - - - 328

5. —— There were two companies, *C.* and *W.*, the directors of each of which entered into business arrangements with the other. The *W. Company* had six directors. A deed was executed in February, 1865, by the 6th clause of which the *W.* directors agreed that three of the *C.* directors should at once become members of the *W.* board; that on certain events happening a fourth director of the *W.* board was to be appointed by the *C.* directors; and that then there should be no farther appointment of *W.* directors except with the sanction of the *C.* directors:—*Held*, that this was illegal; that the stipulation affected the whole of the rest of the deed, and made it illegal and void.—By other arrangements in the same deed the *C.* directors undertook to do such works as the *W.* directors might appoint; to provide materials, to "place" the shares of the *W. Company*, and all the paid-up calls of the *W. Company* were to be paid to the *C. Company*, which was to make all necessary payments for the *W. Company* (acting as its banker) to pay, for two years, 7 per cent. on the capital paid up by its shareholders, to render accounts of works done, and to receive 35 per cent. on all moneys received and paid on account of the *W. Company*:—*Held*, that the payment of the 7 per cent., and that of the 35 per cent., were both illegal.—The deed of February, 1865, was declared by another deed in May, 1866, to be cancelled, except so far as anything had been done under the former:—*Held*, that as nothing was shewn to have been done under the deed of February, 1865, except by some payments of the 7 per cent. interest on the calls paid up, and by the receipt and payment of moneys, as to which the *C.* directors had really acted only in the character of bankers to the *W. Company*, there was no claim for the agreed commission. James *v.* Eve - - - - - - - 335

COMPANY—*continued.*

6. —— A prospectus of an intended company ought not to misrepresent actual and material facts, or to conceal facts material to be known, the misrepresentation or concealment of which may improperly influence and mislead the mind of the reader, for if he is thereby deceived into becoming an allottee of shares, and, in consequence, suffers loss, he is entitled to proceed against those who had thus misled him. But the responsibility of directors who issue a prospectus for an intended company misrepresenting actual and material facts, or concealing facts material to be known, does not, as of course, follow the shares on their transfer from an allottee to his vendee. In order that this third person, the vendee, should be enabled to maintain any proceeding at Law, or in Equity, against the directors in respect of losses occasioned by his belief in the prospectus and his consequent procurement of shares, he must shew some direct connection between them and himself in the communication of the prospectus, and its influence upon his conduct in becoming an allottee: *Seymour* v. *Bagshaw* (18 C. B. 903; 29 L. J. (Ex.) 62, n.) and *Bedford* v. *Bagshaw* (4 H. & N. 538; 29 L. J. (Ex.) 59) overruled. *Scott* v. *Dixon* (29 L. J. (Ex) 62, n.) and *Gerhard* v. *Bates* (2 El. & Bl. 476) explained and adopted.—The rule as to delay in seeking for compensation for losses thus occasioned is, in Common Law proceedings, that which is prescribed by the *Statute of Limitations*, and the rule in Equity follows by analogy that of the Law. Where, therefore, a person became possessed of shares in October, 1865, and the company was ordered in June, 1866, to be wound up, and he contested his liability to be made a contributory, but was, in July, 1867, declared liable as such, and in March, 1868, filed his bill against the directors to be indemnified by them:—*Held*, that delay could not be set up as an answer to the suit.—One of the projectors of a company, a partner of the old firm which sold its business to the company, set up as a defence that he had not taken part in preparing or issuing the prospectus; he knew, however, all that the other directors knew, consented to become a director of the company, signed the memorandum and articles of association, and shares were appointed to him:—*Held*, that under these circumstances he could not avail himself of this defence.—*Per* Lord *Cairns*:—Mere non-disclosure of facts, unless such non-disclosure had the effect of making the disclosed facts absolutely false, would not be sufficient to sustain a proceeding which was really in the nature of an action for misrepresentation.—A prospectus for an intended company was prepared by the projectors (the directors of the company), and issued by them to the public: it contained misrepresentations of facts, facts known to those who issued it, and it also concealed the existence of a deed, which was material to be known, and which, if known, would, in all probability, have prevented the formation of the company. Being addressed to the whole public, any one might take up the prospectus and appropriate to himself its representations, by applying for an allotment of shares:—*Held*, that when the allotment was completed the office of the prospectus was exhausted, and that a person who had not become an allottee, but was only a subsequent purchaser of shares in the

COMPANY—*continued.*
market, was not so connected with the prospectus as to render those who had issued it liable to indemnify him against the losses which he had suffered in consequence of his purchase. Peek *v.* Gurney - - - - - - 377

CONDITION: *See* Charity; Company. 2.
Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more. Attorney-General *v.* Wax Chandlers' Company - - - 1

CONIES: *See* Warren.

CONSIGNEES OF GOODS: *See* Bill of Lading.

CONTRACT: *See* Agreement; Bill of Exchange; Company. 2.

CONTRIBUTORY: *See* Company. 1.

CORNWALL DUCHY: *See* Warren.

COSTS: *See* Company. 1, 2; Delay.

1. In the Court of the Master of the Rolls a transfer of shares in a company had been held to be invalid, and the transferor liable to be made a contributory. By Lord Chancellor *Hatherley* this decision had been reversed. In this House the judgment of the Lord Chancellor was sustained; but on account of the differences of opinion, and the irregularities of the proceedings in the transfer (though no fraud was established), no costs were given. Murray *v.* Bush - 37

2. —— In a proceeding in Error under the *Common Law Procedure Act*, no direction was given as to costs. Taff Vale Railway Company *v.* Macnabb - - - - - 169

3. —— The liability of a director had been declared by *Malins*, V.C., and the relief prayed for by an association against him had been granted with costs. His Honour's decree was, on appeal to the Lord Chancellor, reversed with costs. On appeal to this House, the order of the Lord Chancellor was reversed, but the original decree being varied in some of its details, no costs were given, but the case, with a declaration, was remitted to the Court of Chancery to do what should be just in accordance with the decision of this House. Imperial Mercantile Credit Association *v.* Coleman & Knight - - - - 189

4. —— Where a bill for specific performance of a contract was dismissed, but there had been delay on one side in taking proceedings to enforce performance of the agreement, and delay on the other side in compelling the fulfilment of promises which were the inducement to enter into the contract, the bill was ordered to be dismissed without costs. Lamare *v.* Dixon - - 414

COVENANT.] If the directors of a railway company become, for the purposes of the company, lessees of land, with a privilege to use docks, and agree to pay rent and royalties to the owner of the docks, and enter into other conditions which, by a state of circumstances subsequently created, appear to be unreasonable and impolitic, such stipulations and conditions cannot, on that account, be treated as *ultrà vires* of the directors.—Nor can a condition to pay shipping dues, not

COVENANT—*continued.*
only for goods actually brought along the railway and shipped at those docks, but for goods brought along the railway to be shipped at other docks, be treated as a covenant in restraint of trade.—The directors of a railway company, *T.*, in order to obtain the use of the *B. Docks*, then existing and situated near the end of their line, wherein to ship and unship goods carried along their railway, entered, in 1849, into a contract with the owners of these docks to pay certain dock and lockage dues, and accepted (under the authority of a private Act of Parliament) a lease for 250 years, by which they bound themselves to procure, as far as they could, all goods sent along their railway to or from ships, to be shipped or unshipped at these docks, and to pay certain dues and royalties in respect of all goods, &c., shipped or unshipped there which had been or should be conveyed "along the railway or any part or branch thereof:"—*Held*, that this only applied to the railway or those parts or branches of it which were in connection with some place of shipment or unshipment.—The *T.* directors by the same lease also covenanted that when and so often as goods, &c., conveyed along the *T. Railway*, or any part or branch thereof, should be shipped or unshipped in any dock other than the *B. Dock*, the *T.* directors and their successors should pay to the *B.* trustees the same dues, &c., in respect thereof as would have been payable on such goods if shipped or unshipped in the *B. Dock*:—*Held*, that "shipped or unshipped in any other than the *B. Dock*" did not apply to goods carried along a part of the *T. Railway* and then along any other railway, and shipped at any dock whatever and wherever, but only to docks in connection with the *T. Railway* itself.—*Semble*, that any other construction of the covenant would make it both unreasonable and *ultrà vires*.—After this lease of 1849 had been made, certain private Acts of Parliament were passed which incorporated another body of persons as the *P. Company*, and authorized the construction by the *P. Company* of a line of railway and of docks; and also authorized the directors of the *P. Company* to grant, and the directors of the *T. Company* to accept, a lease of the new undertaking. The lease was duly executed under the powers of these Acts, and the *T.* directors thenceforth used the new line and the new docks, and discontinued the use of the *B. Docks*. In an action by the *B.* trustees upon the covenants in the lease of 1849:—*Held*, that those covenants were not thereby violated; that the *P. Railway and Docks* having been made under Acts of Parliament passed subsequent to the lease, the fact of the *T.* directors becoming the lessees or assignees of the *P.* undertaking did not constitute the *P.* line of railway a "part or a branch" of the *T. Railway*; and that consequently the *T.* directors were not, by the use of the *P. Railway and Docks*, liable to the *B.* trustees as for breach of the covenants in the lease of 1849.—This being a proceeding in Error under the *Common Law Procedure Act*, no direction was given as to costs. Taff Vale Railway Company *v.* Macnabb - - - 169

DAMAGES: *See* Patent.

DELAY.] The rule as to delay in seeking for compensation for losses, is, in Common Law

DELAY—*continued.*

proceedings, that which is prescribed by the *Statute of Limitations*, and the rule in Equity follows by analogy that of the Law. Where, therefore, a person became possessed of shares in October, 1865, and the company was ordered in June, 1866, to be wound up, and he contested his liability to be made a contributory, but was, in July, 1867, declared liable as such, and in March, 1868, filed his bill against the directors to be indemnified by them:—*Held*, that delay could not be set up as an answer to the suit. Peek *v.* Gurney - - - - 377

2. —— The fault of delay in seeking relief against a transaction charged as fraudulent, only begins to effect the complaining party after he has knowledge, or full means of knowledge, of the circumstances alleged to constitute the fraud. Browne *v.* M'Clintock - - - 456

DESIGNATION: *See* Will. 3.

DIRECTORS: *See* Company. 1, 2, 3, 5, 6.

1. —— By one clause of the deed of settlement it was provided that if losses should absorb not only the reserve fund, but also 80 per cent. of the capital subscribed for, "the company shall be *ipso facto* dissolved, and the directors shall within twenty days (and they are hereby required so to do) call a special general meeting of the shareholders, and lay a statement of the affairs of the company before such meeting." A report of an accountant specially employed by the directors shewed that such losses had occurred. No special meeting was called, nor at the next general meeting (which occurred shortly after the date of the report) was the report laid before the shareholders, but the business of the company was continued. At the general meeting of that year the report was not laid before the shareholders, but they were informed that the increased claims upon the company had so reduced the margin of profit that the directors could not recommend the payment of a dividend. At the next general meeting the shareholders were told that three new directors had been elected, but they were not told that three of the old directors had retired, and that their transferred shares constituted the qualification upon which the new directors had been elected:—*Held* (*diss.* Lord *Chelmsford* and Lord *Colonsay*), that these circumstances, though entirely irregular, did not invalidate the proceedings of the directors.—*Per* Lord *Cairns*:—The clauses in this deed are affirmative clauses—the objection as to the non-execution by the transferee of the deed of covenant is cured by the 30th section of the 7 & 8 Vict. c. 110. The moment the transferee assumed to act as a director, and allowed himself to be returned as a shareholder, he lost all right to question his liability.—*Per* Lord *Chelmsford*:—A transferee of shares may be estopped from disputing his liability as a shareholder, and yet his ownership of the shares may not qualify him for holding office as a director in the company. The 30th section of 7 & 8 Vict. c. 110, does not apply to this case:—*Held*, also (*diss.* Lord *Chelmsford* and Lord *Colonsay*), that a transfer of shares though made irregularly might be sufficient to relieve the transferor from liability to become a contributory.—The directors had no power to dispense with the execution, by a transferee, of a deed of covenant—the only discretion they possessed as to such deed related to the place of its execution. Murray *v.* Bush - - 37

2. —— A director of a joint stock company is in a fiduciary position towards the company, and if he makes any profit on account of transactions of business when he is acting for the company, he must account for them to the company.—So, if, acting for himself, he proposes to the company a contract from the execution of which he will derive a profit, that profit belongs to the company. Imperial Mercantile Credit Company *v.* Coleman & Knight - - - - 189

3. —— There were two companies, *C.* and *W.*, the directors of each of which entered into business arrangements with the other. The *W. Company* had six directors. A deed was executed in February, 1865, by the 6th clause of which the *W.* directors agreed that three of the *C.* directors should at once become members of the *W.* board; that on certain events happening a fourth director of the *W.* board was to be appointed by the *C.* directors; and that then there should be no farther appointment of *W.* directors except with the sanction of the *C.* directors:—*Held*, that this was illegal; that the stipulations affected the whole of the rest of the deed, and made it illegal and void.—By other arrangements in the same deed the *C.* directors undertook to do such works as the *W.* directors might appoint; to provide materials, to "place" the shares of the *W. Company*, and all the paid-up calls of the *W. Company* were to be paid to the *C. Company*, which was to make all necessary payments for the *W. Company* (acting as its banker), to pay, for two years, 7 per cent. on the capital paid up by its shareholders, to render accounts of works done, and to receive 35 per cent. on all moneys received and paid on account of the *W. Company*:—*Held*, that the payment of the 7 per cent., and that of the 35 per cent., were both illegal. James *v.* Eve - 335

DOCKS: *See* Company. 2.

EQUITY.] Where, in the making of an agreement between two parties, there has been a mutual mistake as to their rights, occasioning an injury to one of them, the rule of equity is in favour of interposing to grant relief.—The Court of Equity will not, if such a ground for relief is clearly established, decline to grant relief merely because, on account of the circumstances which have intervened since the agreement was made, it may be difficult to restore the parties exactly to their original condition.—What is the nature of a mistake and what has been the cause of it will be considered in determining whether relief ought to be granted. The rule *ignorantia juris neminem excusat* applies where the alleged ignorance is that of a well-known rule of law, but not where it is that of a matter of law arising upon the doubtful construction of a grant. In the latter case it is not decisively a ground for refusing relief.—Acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted, or abstained from acting, through being ignorant that he possessed rights

EQUITY—*continued.*
which would be available against that which he permitted to be enjoyed. Earl Beauchamp *v.* Winn - - - - - - - 223

2. ——*Per* Lord *Chelmsford*:—The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court. Lamare *v.* Dixon - - 414

FARTHER DIRECTIONS: *See* Practice.
FIDUCIARY SITUATION: *See* Company. 3; Director.
FRANCHISE: *See* Warren.
FRAUD: *See* Company. 6; Delay. 2.
FREIGHT: *See* Bill of Lading; Insurance.
FRUIT TREES: *See* Tithes.

GRANT: *See* Equity; Warren.

IGNORANCE OF RIGHTS: *See* Equity; Warren.
The rule *ignorantia juris neminem excusat* applies to the case of ignorance of a well-known rule of law, not to a doubtful construction of a grant. Earl Beauchamp *v.* Winn - 223
ILLEGITIMATE CHILDREN: *See* Will. 3.
INDEMNITY: *See* Company. 4.
M. consented, at the request of the secretary of the *C. Company*, to become the purchaser of shares in the *W. Company*. The shares were purchased by him for the *C. Company*, from which he received £15 for himself. He never paid anything for these shares, the money being paid by the *C. Company*, on whose behalf he had purchased them. *M.* executed transfers of the shares to the *C. Company* (at the written desire of the secretary of that company), and took no farther trouble in the matter. The *C. Company* was ordered to be wound up. The *W. Company* was wound up voluntarily, under the direction of the Court. There were pecuniary transactions between the two companies. The *W. Company* made a call on *M.* in respect of his shares. The shares were declared forfeited for non-payment of calls. *M.* afterwards explained all that had been done, and the *W.* directors, in consideration of his transferring to them all his rights and interests in the shares, released him from all liability to them. *M.* took out a summons for the purpose of compelling the *C. Company* to indemnify him against any demands that might be made on him by, or on account of, the *W. Company*;—*Held*, that this was a mere case of trustee and *cestui que trust*, and that *M.* was entitled to the indemnity. James *v.* May - - - - - - 328
INQUIRY AS TO DAMAGES AND PROFITS: *See* Patent.
INSURANCE.] It is a principle of insurance law that no abandonment is necessary where there is nothing which, on abandonment, can pass to or be of value to the underwriters. Where, therefore, there was a policy on ship, and also on charterparty freight (that is, freight to be earned by the carriage homeward of a cargo chartered to be put on board at a distant port), and the ship was so injured on the outward voyage that the shipowner abandoned to the underwriter on ship, there was nothing to pass to the underwriter on charterparty freight, and, consequently, there was no necessity for abandonment to him.—The damage to the ship from perils of the sea during the voyage, covered by the policy on ship, being such as to justify abandonment to the underwriter on ship before the cargo was put on board, the insured freight could not be earned, and there would therefore be a total loss on the policy on freight. —A ship sailed on its outward voyage to *New Zealand*. More than a month afterwards the owners chartered it to *M.* to bring home a cargo from *Calcutta*. By this charterparty, after discharging at *New Zealand*, it was to sail to *Calcutta*, and being there "tight, staunch, and strong, and everyway fitted for the voyage," the charterer bound himself to put on board a specified cargo for *England* at a stipulated freight. The owners then effected a policy, in the usual form, against perils of the sea, &c., upon the freight to be earned on this homeward voyage.—The ship was seriously injured in the outward voyage; it was repaired as well as the master, with insufficient funds, and at a place not capable of making full examination and effecting complete repairs, could get it repaired; and with the ship thus partially repaired he sailed from the place where the ship then was, and arrived at *Calcutta*, where the fullest examination and the completest repairs could be had. He immediately tendered the ship to the agents of the charterers for the homeward cargo. They, on the ground that the charterer had become bankrupt, refused to load a cargo. The master then had the ship fully examined, and it was found that the injuries on the outward voyage had been such that the complete repair of the ship, to render it fit for the voyage home, would exceed the value of the ship when repaired, and the amount of freight to be earned. The owners, on receiving this intelligence, abandoned:—*Held*, that this was a loss of freight occasioned by the perils of the sea:—*Held*, also, that no notice of abandonment to the underwriters on freight was necessary:—*Held*, also, that, if a notice of abandonment to the underwriters on freight had been necessary, the notice here would not, under the circumstances, have been too late. Rankin *v.* Potter - - - - - - - 83

LEASE: *See* Company. 2.
LEGITIMATE CHILDREN: *See* Will. 3.
LIMITATION: *See* Will. 2.
LIQUIDATORS.] Where a company is being voluntarily wound up under the authority of the Court, the liquidators cannot recognise the release of one of its contributories, declared by a deed of the directors, without first obtaining the sanction of the Court. James *v.* May - - 328

MARKET.] In the *Cambridge Market Act*, 1850, power was given to the mayor, aldermen, and burgesses in council, to "enlarge," as well as improve the market of that borough:—*Held*, that the meaning of the word was not restricted to merely extending the market to streets theretofore forming parts of its sides, but authorized them to extend the market to other streets in its

MARKET—*continued.*
immediate neighbourhood, even though such streets were not mentioned in the Act.—The words in the Act the "market place," were not confined to the *Market Hill*, but extended to streets where *de facto* the market had been held.—The general object of the Act being to enlarge and improve the market of the borough, the mayor and aldermen, who had the right to hold markets in the borough, though by the Act not authorized to enlarge an existing corn exchange, were held authorized to erect a new corn exchange, and make it adjoin the borough market, such being, in their opinion, a matter of public convenience, and an enlargement and improvement of the market.—The borrowing powers of the corporation explained. Attorney-General *v.* Mayor of Cambridge - - - - - 303

MISREPRESENTATION: *See* Bill of Exchange; Company.

MODUS: *See* Tithes.

MUTUAL MISTAKE: *See* Agreement; Equity.

NOTICE: *See* Insurance.

ORDER, FORM OF: *See* Practice.

OWNER OF A SHIP PAYING FREIGHT ON HIS OWN GOODS: *See* Bill of Lading.

PARTNER.] *C.* was held liable to refund to an association, of which he was both a member and a director, money which he had unlawfully received by taking an increased commission on work of the association contracted to be done by himself.—*C.* had a partner, *K.*, who was not in any way connected with the association; the transaction, however, had been a partnership transaction:—*Held*, that the partners were liable, jointly and severally, to make good to the association the profits which it ought to have received in the increased amount of the commission. Imperial Mercantile Credit Association *v.* Coleman & Knight - 189

PATENT.] The rule that, upon a decree against a party for the infringement of a patent, the patentee is not entitled (under the 21 & 22 Vict. c. 27, ss. 2, 5), to have both an account of profits and an inquiry into damages, is now established, and applies to every case of infringement. The patentee must therefore elect which of the two forms of relief he will adopt.—The course adopted as to this matter in *Neilson* v. *Betts* (Law Rep. 5 H. L. 1) affirmed.—Persons accused of the infringement of *Betts'* patent were Appellants to this House when *Neilson* v. *Betts* was decided. In that case the question of the validity of the patent and the other question of infringement were fully argued. Those questions were decided in favour of the Respondent. But the House also adopted the suggestion of one of the Lords that the decree of the Court below, which had given the Respondent the benefit both of an inquiry into profits and an inquiry into damages, must be varied by restricting him to one of these inquiries alone. After that decision an offer was made by the Appellants in this case to give up the argument on the questions of validity and of infringement, and to withdraw from the appeal, if the Respondent would consent to the varying of the decree. The Respondent declined to enter into

PATENT—*continued.*
any arrangement:—The House followed exactly the course pursued in *Neilson* v. *Betts*, and directed the Respondent to pay the costs incurred subsequently to his declining the proposed arrangement. De Vitre *v.* Betts - - 319

PLANS AND SECTIONS: *See* Railway.

POWER: *See* Company; Market.

PRACTICE.

1. A city company had held property for charitable purposes. It was decided that the property was held on trusts which exhausted the whole income. The company had purchased more property, which it had generally treated as devoted to the same charitable purposes. There was no proof as to the fund which had supplied the purchase-money. In the absence of such proof, it was *held*, that the added property must be treated as belonging to the *Wax Chandlers;* and it was declared that it did belong to them, and an order was made for an inquiry to distinguish the two properties, and for the application of the rents and profits thereof.—To declare under such circumstances as existed here that this added property was to be treated as the property and made in the same way subject to account for the purposes of the charity would be like following and taking possession of the back rents *bonâ fide* received by the company: a course which the practice of the Court did not sanction. Attorney-General *v.* Wax Chandlers' Company - - - 1

2. —— In the Court of the Master of the Rolls a transfer of shares in a company had been held to be invalid, and the transferor liable to be made a contributory. By Lord Chancellor *Hatherley* this decision had been reversed. In this House the judgment of the Lord Chancellor was sustained; but, on account of the differences of opinion, and the irregularities of the proceedings in the transfer (though no fraud was established), no costs were given. Murray *v.* Bush - 37

3. —— In a proceeding in Error under the *Common Law Procedure Act*, no direction was given as to costs. Taff Vale Railway Company *v.* Macnabb - - - - - 169

4. —— The liability of a director of an association had been declared by *Malins*, V.C., and the relief prayed for by the association had been granted with costs. His Honour's decree was, on appeal to the Lord Chancellor, reversed with costs. On appeal to this House, the order of the Lord Chancellor was reversed, but the original decree being varied in some of its details, no costs were given, but the case, with a declaration, was remitted to the Court of Chancery to do what should be just in accordance with the decision of this House. Imperial Mercantile Credit Association *v.* Coleman & Knight - - 189

5. —— The rule that, upon a decree against a party for the infringement of a patent, the patentee is not entitled (under the 21 & 22 Vict. c. 27, ss. 2, 5), to have both an account of profits and an inquiry into damages, is now established, and applies to every case of infringement. The patentee must therefore elect which of the two forms of relief he will adopt.—The course adopted as to this matter in *Neilson* v. *Betts* (Law Rep. 5 H. L. 1) affirmed. De Vitre *v.* Betts - 319

PRACTICE—*continued.*

6. —— Where a company is being voluntarily wound up under the authority of the Court, the liquidators cannot recognise the release of one of its contributories, declared by a deed of the directors, without first obtaining the sanction of the Court. James *v.* May - - - 328

7. —— A cause petition was presented in *Ireland* to set aside certain sales of property made many years ago, in which the petition alleged that *B.* was the real purchaser, though the purchases were made in the name of *U.* The Lord Chancellor directed certain issues to be tried to ascertain the facts. The jury found that all the sales, except one, had been made as alleged, but that that one was a sale in which *U.* was the real purchaser. A motion was made before the Lord Chancellor for a new trial, which he refused to grant. The cause afterwards came on before the Vice-Chancellor on farther directions, when His Honour, after reviewing all the evidence and the affidavits on both sides, expressed his belief that though the one excepted purchase had really been made by *U.* it was so made on a secret understanding between the parties that it should afterwards be transferred by *U.* to *B.*, and he made an Order declaring all the purchases void:—*Held*, that this Order, proceeding on a point not raised in the cause petition, so far as it related to the excepted purchase, could not be supported. Browne *v.* M'Clintock - - - - - 434

8. —— An issue directed by the Court of Chancery, in a case where the bill charges the Defendant with fraud in the purchase of land, is not defective in form because it directs the Defendant in the suit to support the affirmative of the issue and shew that the purchase which is the subject of the issue was made *bonâ fide*.—The Judge in Equity having directed an issue, possesses a larger discretion than does a Court of Common Law in determining whether the finding of a jury upon the issue is satisfactory. And a Court of Appeal will not interfere with the exercise of this discretion unless upon very strong and manifest reasons. Browne *v.* M'Clintock - - 456

PRIVATE ACTS: *See* Company; Market; Railway.

PROFITS: *See* Patent.

PROJECTOR: *See* Company. 6.

PROSPECTUS: *See* Company. 6.

The proper purpose of a prospectus of an intended company is to invite persons to become allottees of the shares, or original shareholders in the company. When it has performed this office it is exhausted. Peek *v.* Gurney - - 377

PROVISO: *See* Will. 2.

A proviso in a will being at the end of all the devises, must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only. Giles *v.* Melsom - - - - - - 24

PURCHASE: *See* Practice.

RAILWAY.] A railway Act obtained by the *Great Eastern Railway Company* for extending its line into the city of *London*, and there making a station, incorporated the *Railways Clauses Act*, and declared that plans and sections "had been deposited," and then gave a general power to stop up streets within a given area. *Sun Street* was within the area, but the plans and sections had described it as crossed by "an arch;" and in a subsequent Act, where many of the levels were altered, it was spoken of as crossed underground by a tunnel. The railway company proposed to build a station on the soil of *Sun Street*:—*Held*, that the company might do so; for, that the street being within the area described, there was nothing inconsistent in the provisions of the Acts, the power to cross it by an arch, or a tunnel, not affecting the right to use the surface of the soil for a station if built within the area described in the Act. Attorney-General *v.* Great Eastern Railway Company - - - - - 367

REMEDY, ELECTION OF: *See* Patent.

REPRESENTATION: *See* Bill of Exchange.

SHIP: *See* Bill of Lading; Insurance.

SHIPPING DUES: *See* Covenant.

SOIL, RIGHT TO THE: *See* Warren.

SPECIFIC PERFORMANCE.] A decree for specific performance of a contract cannot be accompanied by directing an inquiry whether a matter which was a consideration for entering into the contract has been, or can be, properly performed.—Where a suit is instituted for specific performance of a contract, and the defence set up is, that the contract was made in consideration of certain promises which the Plaintiff had not fulfilled, a delay to defeat that defence must be such as amounts to an acquiescence in the non-fulfilment of the alleged promises.—Where the subject of the contract was an agreement to take the lease of a house, and the proposed tenant went into possession at once, and occupied for two years, but, while continuing in occupation, from time to time called on the landlord to fulfil promises which the tenant alleged to have been the inducement for the contract, and paid rent, but always paid it under protest:—*Held*, that these circumstances did not amount to such acquiescence as to prevent the tenant from ultimately refusing to perform the contract, but that the payments were to be treated as merely made in respect of the actual use and occupation, and in no other character.—*Per* Lord *Chelmsford*:—The exercise of the jurisdiction of Equity as to enforcing specific performance of agreements, is not a matter of right in the party seeking relief, but of discretion in the Court. Lamare *v.* Dixon - - 414

STATUTES AND ACTS:

5 Geo. 4, c. 103: *See Allen* v. *The Bishop of Gloucester* - - - - 219

7 & 8 Vict. c. 110: *See Murray* v. *Bush* 37

21 & 22 Vict. c. 27: *De Vitre* v. *Betts* 319

Great Eastern Railway Act: *See Attorney-General* v. *Great Eastern Railway Company* - - - - 367

Inclosure Act: *See Dudman* v. *Vigar* - 212

SUN STREET: *See* Railway.

TILLAGE: *See* Tithes.

TITHES.] The Commissioner appointed under an Inclosure Act stated that lands in the parish were subject to a certain modus, which "extended only to the lands when occupied by the owners thereof," or by residents, but that such lands would become liable to the payment of tithes, the amount of which he specified in a schedule, when otherwise occupied, or "if converted into tillage." A resident owner built in one of his fields, then subject to the modus, a house, attached to it a garden, and planted fruit trees on the rest of the field:—*Held*, that by the planting of the fruit trees there had not been a conversion into tillage so as to destroy the modus and render the land subject to the increased tithe.—*Per* the Lord Chancellor (Lord *Selborne*):—The conversion into tillage of any part of the land, if such conversion had actually taken place, would not under this award make the whole field, but only that part of it which was so converted, liable to the increased tithe. Dudman *v.* Vigar - - - 212

TRUST: *See* Charity; Company; Director; Indemnity.

Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more.—In 1558 a testator gave certain houses in *Old Change* to his son and the son's heirs, but, if the son died without issue, to the *Wax Chandlers* of the City of *London*, "for this intent and purpose and upon this condition," that they should distribute annually £8 in the manner therein described, viz., £3 18*s.* to the poor of *St. Mary Magdalen*, and 2*s.* to the churchwardens for their painstaking; 38*s.* to the poor of the parish of *Bexley*, in *Kent*, and 2*s.* to the churchwardens of that parish for their pains; 35*s.* to the poorest men and women of the *Company of Wax Chandlers*, and the other 5*s.* to the Master and Wardens of the Company, "and the rest of the profits of the said houses and tenements I will shall be bestowed upon the reparation of the said houses and tenements." If the Master and Wardens should leave any of these things undone, the property was to go over to the testator's next of kin, "upon condition that they should do all these things." The son died unmarried, and the *Wax Chandlers* entered into possession, kept the premises in repair, and, after the great Fire of *London*, rebuilt them. The rents had largely increased:—*Held*, that the will created a trust. Attorney-General *v.* Wax Chandlers' Company - - - - - - - 1

TRUSTEES: *See* Church Building Act.

ULTRÀ VIRES: *See* Company; Covenant; Directors.

USE AND OCCUPATION: *See* Argument.

A. was the owner of some land, on which he was about to erect buildings. *B.* wished to have cellars there for wine vaults. *A.* promised that they should be made dry, but would not introduce that promise into the written agreement. *B.*, however, confiding in the promise, signed the agreement, by which he undertook to accept from *A.* a lease of the vaults for a certain term and at a certain rent. *B.* was to pay down £100, and was to pay another £100 on the execution of the lease. *B.* paid the first £100, and, for his own convenience, before the day fixed, took possession of the vaults, and placed therein a large quantity of wine, but soon complained that the vaults had not been made dry. These complaints he constantly renewed, and every time he paid the rent paid it under protest; and, finally, after more than two years' actual occupation of the cellars, refused to sign the lease on the ground that the cellars had not been made fit for his occupation, and he did not pay the second sum of £100, but removed his stock of wines to another place. On a bill for specific performance, the Court below granted a decree against *B.*, but accompanied it with a direction that there should be an inquiry whether a certain thing suggested by *B.* in the course of the long correspondence between the parties, but neglected by *A.*, should not be done:—*Held*, that the taking possession of the vaults and the payment of the rent, which payment must be attributed to the actual use and occupation of the premises, did not prevent *B.* from setting up as a defence the non-performance of the promise which had been the inducement to the contract.—Per Lord *Cairns*:—The law implies that a person who takes possession of premises before the agreed works to render them fit for occupation are at an end, does so without prejudice to his rights under the agreement. Lamare *v.* Dixon - 414

VOLUNTARY WINDING-UP: *See* Practice. 6.

WARREN.] A grant of "warren" may pass the soil; it may pass nothing but a franchise to be exercised over the soil. The phrase "a warren of conies" will only pass the franchise.—A right of entering within the limits of a warren to kill rabbits may be properly described as a "tenement."—The Duchy of *Cornwall* was in the possession both of the soil of a manor, and of a warren of conies existing over certain parts of the manor. In March, 1799, the Duchy granted a lease to *P.*, in which the subjects granted were thus described: "All that piece or parcel of woodland situate in *B.*, &c., and all that close called, &c., and all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in *B.*, &c., aforesaid; and that lodge or house thereupon built, &c.; and also all that warren of conies, with all and singular the rights, members, and appurtenances whatsoever in *B.*, &c., both of which said warrens of conies are called or known by the name of *B.* warren, and do extend themselves in and over the wastes or moors of *B.*, *F.*, *S.*, and *A.*," &c.:—*Held*, that these words did not carry the soil, but only a right to the conies, and whatever was fairly incident to, or necessary for, the preserving and making profit of them. Earl Beauchamp *v.* Winn - - - - 223

WIFE'S SISTER, MARRIAGE WITH: *See* Will. 3.

WILL.

1. Little stress can be laid on the use, in a will making a gift to a charity, of the word "condition;" it may mean the same as "intent and purpose," and may be employed to create a trust and nothing more.—In 1558 a testator gave certain houses in *Old Change* to his son and the son's heirs, but, if the son died without issue, to the

WILL—*continued.*

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2. —— A testator had three sons, *John*, *Thomas*, and *Robert*. He devised to each, in the same form of words, a separate property for life, and after a son's death to that son's child or children in fee. In case any one of the sons should die without lawful issue, the property of such son was to be divided equally between the two survivors "in the same manner as the estates hereinafter devised are limited to them respectively; subject, nevertheless, to the proviso hereinafter mentioned." At the end of the three devises came the proviso in these terms: "Provided that in case any or either of my said sons shall depart this life leaving a widow, then I give the hereditaments and premises so specifically devised to such one or more of them so dying, unto his widow and her assigns for and during the term of her natural life." The youngest son died unmarried. His two brothers divided his property between them. The eldest son died, and after him the second son, each leaving a widow, but no child:—*Held*, that each widow was entitled to a life estate in all that had been possessed by her husband during his life.—The proviso is a limitation, and must be so construed. "Specifically" means the same thing, whether used in a devise of land or of chattels. "So" in this case is merely descriptive, and is the same as "hereinbefore." "So specifically" is therefore merely descriptive.—In this will the description was meant to apply whether the property was given directly, as in the first instance, or indirectly, as in the second instance.—The proviso being at the end of all the devises, must have a meaning applicable to all, and not be treated as if placed at the end of one, and thus made applicable to one only. Giles *v.* Melsom - - 24

3. —— The word "children" used in a will *primâ facie* means legitimate children, and no other meaning can be given to it by any conjectural

WILL—*continued.*

application of other words found in the will and supposed to shew the testator's intention; there must be clear evidence of that intention in the will itself to establish another application of the word.—There may be a gift to living illegitimate children as a class, if the words used by the testator clearly shew that such children were intended to be the objects of his bounty.—But whether any such gift to future illegitimate children can take effect? *quære?*—If there is a gift to "children" as a class, the law, if there is nothing in the will clearly to shew a contrary intention, will apply the gift to legitimate children only.—A testator possessed of leasehold estates spoke in his will of *J. C.* as his "son-in-law," and devised these estates to trustees for the use of his "daughter *Mary*, the wife of *J. C.*," for her life, for her sole and separate use, independent of the debts or control of "her present or any after-taken husband," and in several places in his will mentioned *J. C.* and his daughter *Mary* in the same terms. After her death, and if she made no specific appointment, the trustees were to stand possessed of the leaseholds in trust for "the child if only one, or all the children if more than one, of my said daughter *M. C.*" . . . . "but if there shall not be any child of my said daughter *M. C.*" then over. There were children of the union of *J. C.* and *Mary* born and living before the testator's decease, and treated by him as his grandchildren, but that union was not a lawful marriage, *J. C.* having been formerly the husband of *Sarah Ann*, the sister of *Mary*, and having (with the knowledge and assent of the testator) gone through the ceremony of marriage with *Mary* after *Sarah Ann's* death:—*Held*, that there was here a sufficient designation of the children of *Mary* as the intended objects of the testator's bounty, and that his gift to them was valid. Hill *v.* Crook - - 265

WINDING-UP.] Where a company is being voluntarily wound up under the authority of the Court, the liquidators cannot recognise the release of one of its contributories, declared by a deed of the directors, without first obtaining the sanction of the Court. James *v.* May - - - 328

WORDS:—"Along the railway:" *Taff Vale Railway Company* v. *Macnabb* - - 169

—— "Children:" *Hill* v. *Crook* - - 265

—— "Conies:" *Earl Beauchamp* v. *Winn* 223

—— "Declare his interest:" *Imperial Mercantile Credit Association* v. *Coleman & Knight* [189

—— "Enlarge:" *Attorney-General* v. *Mayor of Cambridge* - - - - 303

—— "He or they paying freight:" *Weguelin* v. *Cellier* - - - - 286

—— "Hereinbefore:" *Giles* v. *Melsom* - 24

—— "Interest:" *Imperial Mercantile Credit Association* v. *Coleman & Knight* - 189

—— "Reparation:" *Attorney-General* v. *Wax Chandlers' Company* - - 1

—— "So:" *Giles* v. *Melsom* - - 24

—— "Specifically:" *Giles* v. *Melsom* - 24

—— "Tenement:" *Earl Beauchamp* v. *Winn* 223

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